II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 December 2001

relating to a proceeding under Article 81 of the EC Treaty

(Case COMP/E - 1/37.919 (ex 37.391) — Bank charges for exchanging euro-zone currencies — Germany)

(notified under document number C(2001) 3693)

(Only the German text is authentic)

(2003/25/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Articles 3 and 15(2) thereof,

Having regard to the Commission decision of 1 August 2000 to initiate proceedings in this case,

Having given the undertakings and associations of undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [3],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

(*) Confidential information has been deleted; it is replaced by square brackets and marked by an asterisk.

(1) OJ 13, 21.2.1962, p. 204.

(2) OJ L 148, 15.6.1999, p. 5.

(3) OJ L 354, 30.12.1998, p. 18.

A. INTRODUCTION

(1) This Decision concerning an infringement of Article 81 of the EC Treaty is addressed to the following undertakings:

— Commerzbank AG,

— Dresdner Bank AG,

— Bayerische Hypo- und Vereinsbank AG,

— Deutsche VerkehrsBank AG,

— Vereins- und Westbank AG.

(2) The banks participating in the meeting of 15 October 1997 at Deutsche Verkehrsbank AG in Frankfurt am Main agreed to a commission of about 3 % for the buying and selling of euro-zone banknotes during the three-year transitional period beginning on 1 January 1999. The purpose was to recover about 90 % of the 'exchange margin' income after the abolition of the 'spread' (i.e. buying and selling rates) on 1 January 1999.

B. THE RELEVANT PRODUCT AND TRADE BETWEEN MEMBER STATES

1. The relevant product market

(3) On 1 January 1999, the euro was introduced as the European single currency. The twelve participating

euro-zone countries are: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, Portugal, Spain, the Netherlands and Greece ([4]). During the transitional period (1 January 1999 to 31 December 2001), the euro existed in different denominations. The national currency units (ATS, BEF/LUF, DEM, ESP, FIM, FRF, IEP, ITL, NLG, PTE and GRD) were sub-units of the euro according to the conversion rates which were irrevocably fixed as from 1 January 1999.

(4) The relevant product market is defined as the service of exchanging the 'subunits' ([5]) of the euro where at least one part of the transaction concerns notes and coins ('in-currency banknotes') ([6]). This service — buying and selling foreign euro-zone currencies — was offered mainly by banks and by bureaux de change. The following are typical examples of such exchange transactions:

— foreign in-currencies (cash) exchanged to be debited from or credited to an account denominated in euro or in the national in-currency,

— foreign in-currencies (cash) exchanged for the national in-currency (cash), and vice versa.

(5) Whatever the supply substitutability, demand substitution for the (partly) cash exchange of in-currencies is very limited, if not non-existent. In particular as far as tourism is concerned, customers follow tour operators' and banks' advice to carry only small amounts of cash on them and to use their debit or credit cards abroad.

(6) As for other categories of customer such as small businesses which exchange larger amounts of currency to carry out payments in other countries, cross-border bank-to-bank transfers may not present a viable alternative.

2. **Trade between Member States**

(7) The data on volumes of note and coin transactions come from the answers to a questionnaire sent in October and December 1999 to about 240 banks in the euro zone (see recitals 22 to 24).

(8) The 1998 selling and buying volumes for note and coin transactions per euro-zone country for all euro-zone currencies are shown in Annex I. The amounts shown are underestimates because not all banks were able to provide data on transaction volumes. Furthermore, not all banks in the euro zone were sent the questionnaire. Also, the questionnaire did not systematically cover bureaux de change operations so that the transaction volumes for this business are not included in the data.

(9) For selling, the transaction volume for all euro-zone currencies was about EUR 17,5 billion in 1998. About 35 % of this transaction volume was attributable to the selling of DEM. For buying, the transaction volume was about EUR 24,7 billion. Over 50 % of this transaction volume was attributable to the buying of DEM. The total transaction volume for buying and selling was about EUR 42,2 billion in 1998. Within the euro zone, the DEM was by far the most exchanged (bought and sold) currency (see Annex euro zone). Annex shows that there was considerable exchange of euro-zone currencies in each Member State.

C. **THE MARKET IN GERMANY**

1. **The banks**

(10) Universal banks that engage in a wide range of banking activities dominate the German banking system. At the end of 1998 there were more than 3 400 banks with over 45 000 branches.

(11) Universal banks can be classified into three major groups:

— commercial banks (*Kreditbanken*): This group includes Deutsche Bank, Bayerische Hypo- und Vereinsbank, Dresdner Bank and Commerzbank (the 'Big Four'),

— savings banks and their regional giro institutions (*Sparkassen* and *Landesbanken*): This group is made up of 594 savings banks, 12 Landesbanks and DGZ DekaBank Deutsche Kommunalbank,

— cooperative banks (*Volks- und Raiffeisenbanken*) and their central institutions (*Zentralbanken*): this sector consists of 2 256 local cooperative banks and four central banks (DG Bank, SGZ-Bank, WGZ-Bank and GZB-Bank).

(12) In addition to the universal banks there is a wide range of specialised banks such as mortgage banks (*Hypothekenbanken*) and banks with special functions and other financial institutions such as building societies (*Bausparkassen*).

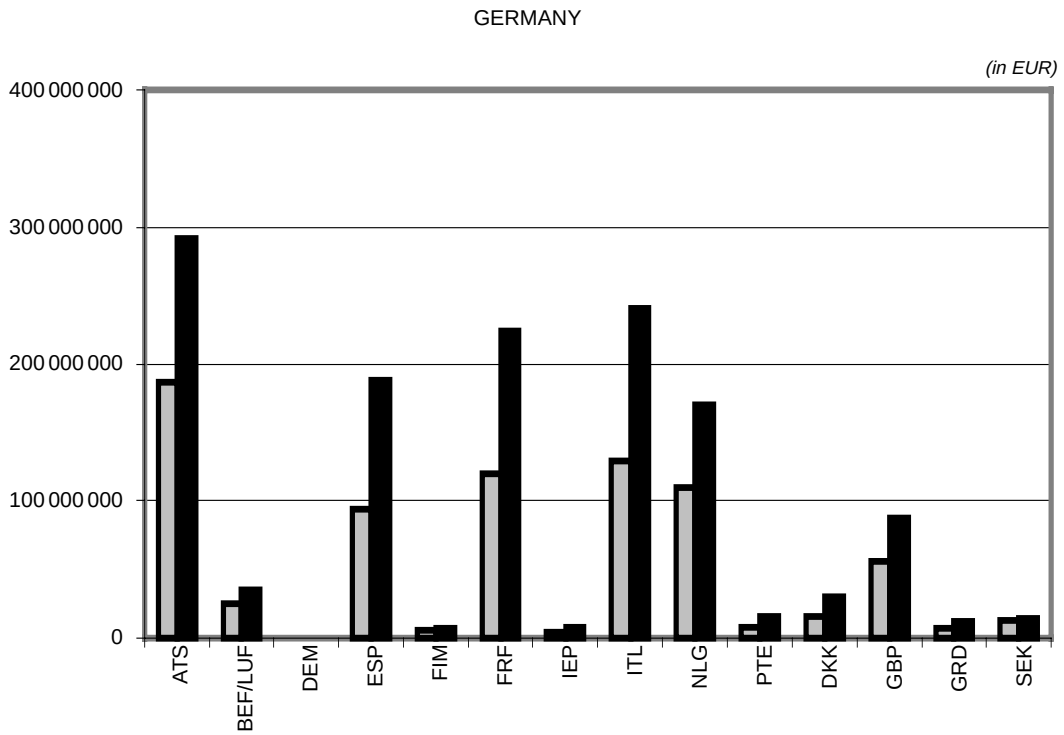
([4]) Greece joined the euro-zone countries on 1 January 2001.
([5]) See first preamble to the Commission's recommendation of 23 April 1998.
([6]) Most banks buy only foreign currency notes and no coins. Most bureaux de change also buy foreign currency coins, although at a higher rate than for notes.

2. **Currency exchange transaction volumes**

(13) Of the survey sample of 42 banks (see recitals 22 and 23), 35 banks carry out currency exchange transactions. For these 35 banks, the volumes of Community currencies bought and sold per currency in 1998 are shown in Figure 1 below.

Figure

Volumes of currencies bought and sold in Germany (1998)



(14) For the currencies shown in Figure 1, the total value of notes bought and sold in 1998 was approximately EUR 2,1 billion, with about twice as much being sold than bought. The buying and selling of ATS represented about 22 % of the value of currencies bought and sold, followed by ITL, FRF, ESP and NLG, which accounted (in descending order) for between about 18 % and 13 % each. The in-currencies represented about 90 % of the value of the EU notes bought and sold ([7]).

D. **PROCEDURE**

1. **The requests for information**

(15) On 8 February 1999 the Commission addressed requests for information under Article 11 of Regulation No 17 to three German banking associations, namely the Bundesverband deutscher Banken, the Deutscher Sparkassen- und Giroverband and the Zentraler Kreditausschuss. The associations were asked to provide all minutes and/or records of meetings held within the association where questions relating to euro conversion, exchange of in-currencies, as well as costs (to credit institutions) and charges (to customers) were discussed. Also requested were copies of all correspondence exchanged between the association and its members, circulars addressed by the association to its members, and responses of the association to enquiries from its members concerning the abovementioned questions.

(16) The Deutscher Sparkassen- und Giroverband responded by letter dated 3 March 1999. The Bundesverband deutscher Banken and the Zentraler Kreditausschuss each responded by letter dated 14 April 1999.

([7]) According to Westdeutsche Landesbank, German Bundesbank statistics give the total value of notes and coin bought and sold by German banks as EUR 6,8 billion; in-currencies represented 52 % of the total. This indicates that the value of in-currencies bought and sold was about EUR 3,4 billion and not EUR 2 billion as indicated by the survey. Westdeutsche Landesbank's reply to the statement of objections, p. 7 (file, p. 3976).

(17) On 7 July 1999 the Commission addressed a further request for information under Article 11 of Regulation No 17 to the Bundesverband deutscher Banken asking for clarification concerning a number of meetings devoted to charges for foreign exchange transactions. The Bundesverband deutscher Banken responded by letter dated 29 July 1999.

(18) On 6 March 2000 the Commission addressed a further request for information under Article 11 of Regulation No 17 to the Bundesverband deutscher Banken and to the German Bundesbank asking for details of any discussions and/or recommendations on charges and charging structures that had been made in Germany, and more specifically on:

— a 3 % charge and a minimum fee of DEM 5, and/or

— a 4 % charge and a minimum fee of DEM 3.

(19) By letters dated 21 March 2000, the Bundesverband deutscher Banken and the Bundesbank both replied that they had no knowledge of any such discussions and/or recommendations on charges and charging structures.

2. **The February and October 1999 inspections**

(20) Under Article 14(3) of Regulation No 17, inspections were carried out on 16 and 17 February 1999 at two locations in Germany:

— Deutsche Bank AG (Frankfurt head office),

— Dresdner Bank AG (Frankfurt head office).

(21) Under Article 14(3) of Regulation No 17 an inspection was carried out on 20 and 21 October 1999 at a location in the Netherlands:

— GWK Bank NV/De Grenswisselkantoren NV (Diemen) ([8]).

3. **Survey of bank charges for exchanging banknotes**

(22) By letter dated 19 October 1999, the Commission under Article 11 of Regulation No 17 sent a questionnaire to about 240 banks in the euro zone asking them to provide data on bank charges for foreign exchange transactions before and after the introduction of the euro. The addressee banks represent about 80 % of banking turnover in the euro zone.

([8]) GWK Bank specialises in the exchange of foreign currency banknotes and has 68 bureaux de change, including 33 at main railway stations and 25 along the border.

(23) The questionnaire requested data on the buying, selling and reference rates ('official' rate) for each currency on 15 January 1998 and 15 December 1998, and the charges and charging structure on 15 January 1999. Also requested were the selling and buying volumes (per currency) of transactions carried out in 1998.

(24) The questionnaire dated 19 October 1999 was addressed to 42 banks in Germany, including the following addressees of this Decision:

— Bayerische Hypo- und Vereinsbank AG,

— Commerzbank AG,

— Deutsche VerkehrsBank AG,

— Dresdner Bank AG.

4. **The statement of objections**

(25) By letters dated 3 and 10 August 2000, the Commission sent a statement of objections to Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG, Dresdner Bank AG, Bayerische Hypo- und Vereinsbank AG, Vereins- und Westbank AG and other banks ([9]).

5. **Replies to the statement of objections and the hearing**

(26) Following requests from the parties, the Hearing Officer informed the parties of his decision to extend the deadline for responding to the statement of objections (hereinafter called 'SO') from 3 November to 27 November 2000.

(27) Deutsche Verkehrsbank AG and Reisebank AG ([10]) requested access to all other country-specific files and

([9]) In April and May 2001, with a view to termination of the proceedings, several banks proposed (a) for the general public, a considerable and immediate reduction (from May/June onwards) in charges and (b) a further substantial reduction in charges from October 2001 onwards for account holders. On the basis that the market for the exchange of in-currencies would disappear at the end of the year, and given that the proposed measures would produce immediate beneficial effects for consumers as well as facilitate the changeover to the euro, the Commission decided under the exceptional circumstances of the present case to terminate proceedings against: Bayerische Landesbank Girozentrale, SEB Bank AG (former BfG Bank AG), Hamburgische Landesbank Girozentrale, Westdeutsche Landesbank Girozentrale, Landesbank Hessen Thüringen Girozentrale, GWK Bank/De Grenswisselkantoren NV (and parent companies Fortis NV, Fortis Services Nederland NV and Fortis Bank Nederland NV).

([10]) Deutsche Verkehrsbank AG stated in its reply to the SO that, as only Reisebank AG was active on the retail forex market, the Reisebank AG reply to the SO would be referred to in its totality by Deutsche Verkehrsbank AG: pp. 1 et seq. (file, pp. 3692 et seq.).

the complete Dutch file in particular. They claimed this was necessary to safeguard their rights of defence as they suspected that the Dutch National Bank (DNB) had played a leading role in initiating the contacts between GWK Bank and German banks. They believed that the Dutch file included documents proving DNB involvement.

(28) In response to this request, the Hearing Officer examined the Dutch file (Case COMP/E-1/37.791) and extracted all documents referring to Germany and other countries. Under cover of a letter dated 12 January 2001, these documents were sent to addressees of the SO, who were invited to submit observations by 24 January 2001.

(29) All parties except Deutsche Genossenschaftsbank AG requested a hearing and received an invitation to such a hearing scheduled for 1 and 2 February 2001. All parties except Deutsche Genossenschaftsbank AG attended the hearing.

(30) During the hearing the parties present were informed that they would be provided with a copy of an internal note of the Internal market Directorate-General which contained a short analysis of the approximately 700 complaints received by the Commission departments (Internal market and Consumer protection Directorates-General) from Community consumers in relation to bank charges for various payment means and services following the introduction of the euro.

(31) By letter dated 26 February 2001, the Hearing Officer sent the abovementioned copy of the internal note of the Internal market Directorate-General to the parties and requested them to submit their observations on the note and on the hearing itself by 14 March 2001.

(32) The banks taking the opportunity to comment on the internal note argued that the only reason for complaints was that for the first time customers were able to clearly identify the charges as they were no longer hidden in the difference between the buying rate and the selling rate. Dresdner Bank AG stated that consumers were disappointed as they had wrongly expected no charges at all.

(33) Also at the hearing on 1 and 2 February 2001, the parties repeated their request for full access to all parallel country-specific files. By letter dated 6 August 2001 the Hearing Officer denied these requests. Further requests for supplementary access to the other parallel country-specific files were also denied ([11]).

E. DESCRIPTION OF EVENTS

1. The introduction of the euro

(34) The Madrid European Council of 15 and 16 December 1995 adopted a timetable for the changeover to the euro. The Madrid Council established the starting date for Stage 3 of Economic and Monetary Union (hereinafter called 'EMU') as 1 January 1999. For a period of three years from this date, the conversion rates would be irrevocably fixed among the currencies of participating countries (in-currencies) and against the euro ([12]).

(35) From 1 January 1999, and for a three-year transitional period, the euro would exist as a 'virtual' currency in the euro-zone countries. National banknotes of each euro-zone country would continue to circulate and foreign exchange services for the buying and selling of in-currencies would still be required during this period. However, the 'conversion' between in-currencies would be carried out at the irrevocably fixed exchange rates, and at no other rates.

(36) By 1 February 2002 at the latest, euro banknotes and coins would start to circulate alongside national notes and coins. At most six months later, the national currencies would have been completely replaced by the euro in all participating Member States.

(37) The use of the conversion rates was further stipulated in Council Regulation No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro ([13]). According to Article 4(3) of the Regulation, 'The conversion rates shall be used for conversions either way between the euro unit and the national currency units'.

(38) Prior to the introduction of the euro on 1 January 1999, customers were charged in Germany for the exchange of euro-zone foreign notes and coin (hereinafter called 'exchange of in-currency banknotes')

([11]) See Cases T-216/01 R and T-219/01 R.

([12]) Presidency conclusions of the Madrid European Council of 15 and 16 December 1995 on the scenario for the changeover to the single currency: http://europa.eu.int/euro/.

([13]) OJ L 162, 19.6.1997, p. 1.

almost exclusively via a spread ([14]). The irrevocable fixing of the exchange rates as from 1 January 1999 meant the abolition of the different buying and selling rates, i.e. the spread, as a means of expressing charges for the exchange of in-currency banknotes.

(39) Furthermore, the 'exchange rate risk' cost element that existed prior to the introduction of the euro as a result of the fluctuating exchange rates between currencies disappeared with the fixing of euro-zone currencies' exchange rates on 1 January 1999.

(40) While the scenario adopted by the Madrid Council in December 1995 provided the basic framework for the changeover, many practical details relating to technical preparation of the move to Stage 3 remained outstanding. During 1996, the Commission received written comments and queries from associations representing currency users on various aspects of the changeover. With a view to addressing concerns expressed by these associations and to advance technical preparations, the Commission organised on 15 May 1997 a Round Table on practical aspects of the changeover to the euro. The Round Table provided a forum for dialogue among all interested parties, both public and private, and addressed two main sets of issues: the practical arrangements for a smooth changeover to the euro and helping currency users adjust to the euro ([15]).

(41) Under the two main sets of issues, the Round Table discussed a broad range of EMU questions. Among these was a question on the costs of conversion during 1999 to 2001 and during the final changeover. The discussion on this subject mainly concerned the conversion of national currency units to euro units (and vice versa). Regarding the exchange of one participating Member State's banknotes to another during the transitional period, participants argued that this should be chargeable because, 'while exchange rate risk will disappear and thus reduce costs by some 20 %, other costs will remain'.

(42) Following the Round Table of 15 May 1997 the Commission set up an Expert Group on Banking Charges for Conversion to the Euro (hereinafter called 'Expert Group'), in parallel with a number of other groups. The Expert Group — comprised of experts drawn from banking, payment systems, enterprises and consumer organisations — met six times in Brussels (between 10 September and 20 November 1997), and received written and oral contributions from a wide range of market associations and institutions. It received assistance also from the Commission and the European Monetary Institute (hereinafter called 'EMI').

(43) The Expert Group's terms of reference were to consider whether banks would be entitled to charge for conversion to the euro, whether they intended to do so, whether any new rules were necessary at Community level and how to ensure transparency of any conversion charges. In its report of 20 November 1997 ([16]) the Expert Group defines 'conversion' as relating to the process of changing the national currencies of participating Member States into the euro. Conversion thus refers to an arithmetical calculation for quoting national currency units in euro units, and vice versa ([17]). The report expressly states that it did not deal with charges for bank services ([18]).

(44) The European Banking Federation gave evidence to the Expert Group on 24 September 1997. At this meeting, the Chairman of the Expert Group asked the Federation if it might be possible to draw up a list of specific euro-related services which would be free or be subject to charges per country. By letter dated 3 October 1997, the Federation requested its EMU Committee to provide this information giving a deadline of 10 October 1997 for a response. The Expert Group concluded in its

([14]) For the buying and selling of notes and coin to the public, the spread is determined with respect to a market reference rate. In the present case, the buying and selling rate is defined as the rate the bank applies to buy from, or sell to, a customer. This means that the buying rate is lower than the reference rate whereas the selling rate is higher. Depending on whether a buying or selling transaction is being carried out, the spread is either the difference between a reference rate and a buying rate, or the difference between a selling rate and a reference rate. For currency exchange, the spread (with respect to a reference rate) may be in the percentage range.
In foreign exchange trading, a spread is simply the difference between a bid (buy) and offer (sell) rate. Such spreads vary in size according to market volatility. Spreads can be so small that they are quoted to one hundredth of one percent (0,01 percentage commission) of the currency unit, usually called a 'pip'.

([15]) See 'Round table on practical aspects of the changeover to the euro. Summary and conclusions. Brussels, May 15, 1997': http://europa.eu.int/comm/internal_market/en/finances/banks/expert.htm.

([16]) 'Report of the Expert Group on Banking Charges for Conversion to the Euro' to the European Commission, Brussels, 20 November 1997, p. 2.

([17]) In legal terms a conversion, as that term is used here, is for all practical purposes an unknown phenomenon. This is because 'conversion' has little in common with similar-sounding legal concepts such as 'convertibility' or 'currency exchange'. The national currency unit is no more than a description (albeit transitional) of the currency 'euro'. A sum of money will have the same legal identity whether, temporarily, it is being expressed in one way or the other. Indeed the nearest legal analogy is the situation of units and sub units of a national currency. Thus 70 pfennigs is equal to DEM 0,70 and the way in which the book entry is carried out has not been the subject of learned legal expertise but more inspired by the search for technical convenience. See 'Report of the Expert Group on Banking Charges for Conversion to the Euro', Annex A: Legal aspects of charging for conversion.

([18]) See paragraph 4 'What is conversion?' of the Report of the Expert Group on Banking Charges for Conversion to the Euro to the European Commission, Brussels, 20 November 1997.

report of 20 November 1997 that 'most banks intended to charge their customers for the exchange of euro area national banknotes during the transitional period, though charges should be less than at present because the exchange rate risk will have been removed. Charges would cover handling, storage, insurance and processing costs, the opportunity cost of holding stocks of banknotes and the risk of accepting counterfeit banknotes.'

(45) In its report the Expert Group concludes and recommends, among other things, the following:

— 'To encourage "good practice" relating to conversion without charge, the Group considers that the Commission should recommend the standard of "good practice" for banks on conversion without charge … The standard would be advisory rather than binding.',

— 'Where banks are entitled to charge for conversion, and decide to do so, the conversion rate must be used (i.e. the irrevocably fixed rate in relation to euro). The Group recommends … that the use of the conversion rate and any charges should be transparent, and included in the standard of "good practice". To reduce the risk that consumers attribute existing charges to the introduction of the euro, the Group recommends … that the standard should be implemented by banks in advance of 1 January 1999, wherever possible.'

(46) On 23 April 1998, the Commission issued a recommendation concerning banking charges for conversion to the euro ([19]). The recommendation established 'a standard of good practice' on conversion ([20]) without charge regarding certain conversion operations where there is a legal requirement not to charge and on certain other conversion operations in order to facilitate the smooth introduction of the euro (Article 2). For example, banks are legally required to make the conversion without charge of incoming payments denominated in the euro unit into the national currency unit during the transitional period. The Commission recommends that banks should also convert without charge comparable outgoing payments.

(47) The standard of good practice does not include the exchange of in-currency banknotes without charge. The recommendation does not restrict the banks' freedom in independently defining charges according to each individual bank's commercial policy.

(48) The only 'obligation' that the recommendation imposed on banks with regard to exchange of banknotes and coin of participating Member States related to transparency: 'banks should show clearly the application of the conversion rates in accordance with the provisions of Regulation (EC) No 1103/97, and they should identify separately from the conversion rate any charges of any kind whatever which have been applied' (Article 3(1)). The recommendation also says that banks should provide clear and transparent information concerning those exchange charges by providing their customers in writing with both general prior (*ex ante*) information and specific (*ex post*) information on charges which they respectively propose to apply or have applied (Article 3(2)).

(49) The recommendation also provided that banks should inform their customers before 1 January 1999 about whether and to what extent they would implement the recommendation (Article 4(2)). Banks were also recommended to publicise, either individually or in groups, their intention to implement the recommendation (Article 4(3)).

(50) On 8 December 1998 the Commission published a report entitled 'Implementation of the Commission recommendation on banking charges for conversion to the euro' ([21]). The report sets out the information that the Commission had received from European banking associations about the intention of their member banks to implement the recommendation. In July 1998, the Commission asked four banking associations (The European Banking Federation, the European Savings Banks Group, the European Association of Cooperative Banks and the European Mortgage Federation) to report by 1 November 1998 on whether, and to what extent, their member banks were intending to implement the recommendation. Each association's assessment and evidence is published in the annexes to the report.

(51) Regarding Germany the report notes, in part, the following:

'Compliance with the recommendation in each participating Member State

The Central Credit Committee (ZKA), which represents the whole German credit sector, has agreed to respect the provisions of the recommendation. The Bundesverband deutscher Banken considers that all its members intend to implement the recommendation. This is the case with member banks of the EACB and ESBG in Germany as well.

…

([19]) 98/286/EC; (OJ L 130, 1.5.1998, p. 22).

([20]) 'Conversion' within the meaning of the recommendation is the change of denomination of a monetary amount from the national currency unit to the euro unit and vice versa at the conversion rate, in accordance with the provisions of Regulation (EC) No 1103/97.

([21]) This document is publicly available on the Internet at http://europa.eu.int/comm/dgs/internal_market/ (Annexes included).

Information for customers …

In Germany, where banks have issued a great number of publications on the introduction of the euro, EBF member banks will explain the contents of the recommendation with letters or brochures.'

2. **The background in Germany**

(52) A general presentation was made during the hearing on 1 and 2 February 2001 on the legal and economic background. According to this presentation and Westdeutsche Landesbank, a series of meetings took place between commercial banks and the Bundesbank prior to October 1997.

(53) On 8 July 1997, a meeting took place between several commercial banks and the Bundesbank in Frankfurt at which the consequences of the introduction of the euro for the buying and selling of foreign banknotes and coin were discussed ([22]).

(54) Following this meeting, on 22 July 1997 the Bundesbank sent a questionnaire to commercial banks ([23]) concerning the buying and selling of banknotes in the retail and wholesale markets. The questionnaire asked for data on volumes of banknotes exchanged, the transparency of charges during the transitional phase, the consequences for the retail business if the Bundesbank were to offer a free service to the public, and the consequences for the wholesale business if the Bundesbank were to offer a free banknote repatriation service to the commercial banks. The response of each bank was to be treated confidentially by the Bundesbank.

(55) Following the meeting on 8 July 1997 and the Bundesbank questionnaire of 22 July 1997, four commercial banks (Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG and Westdeutsche Landesbank) sent a letter dated 25 July 1997 to the Bundesbank stating their view that the spread should be maintained. This was because the necessary information technology changes could not be made in time and also because any adaptation would give rise to additional costs resulting in higher charges to customers ([24]):

'…The central banks of the participating countries have undertaken, after the fixing of the exchange rates, to exchange euro-zone currencies free of charge. However, from the point of view of the Bundesbank and the regional Landeszentralbanks, there is no interest in taking over the private customer business of banks as a new infrastructure for this purpose would first need to be created.

Owing to the planned obligation on the Bundesbank to buy in-currencies free of charge, a rush of consumers to the Landeszentralbanks would be inevitable as the commercial banks, for cost reasons, would refuse to buy currencies without a spread.

The turnover in forex business in bank branches in Germany amounts to DEM 16 billion. The turnover in DEM clearing with foreign correspondent banks should be added to this figure. The volume of purchases from customers and repatriation volumes will be estimated on the basis of a separate Bundesbank questionnaire.

The practical implementation of the necessary measures has been discussed between the signatories, who are heavily involved in the currency exchange business.

The question of charging instead of the current spread (selling/buying rates) was seen as highly problematic.

As a result of the discussion, all participants have in principle rejected a change as the resulting costs for IT adaptation would make the exchange of banknotes more expensive, and the public would not appreciate higher charges. Consumers would not understand the introduction of a charge when exchange rates were fixed and central banks purchased in-currencies free of charge.

It is also important to note that IT changes cannot be made at such short notice.

A survey among our euro-business partners has shown that foreign banks also insist on keeping the spread.

A separation between fixed rate plus commission in retail business and keeping the margins in interbank business may be possible for banks with branches as they can directly influence their branches. In the sector of Sparkassen (savings banks) and Genossenschaftsbanken (cooperative banks), such an

([22]) Reply of Westdeutsche Landesbank to the SO, p. 16 (file, p. 3985).

([23]) Reply of Westdeutsche Landesbank to the SO, p. 16 (file, p. 3985).

([24]) *'Auswirkungen der EWWU auf das Sortengeschäft'*, Letter from Interessengemeinschaft Sortenhandel c/o […]* (Deutsche Verkehrsbank AG) to […]* (Landeszentralbank Hessen) of 25 July 1997 signed by Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG and Westdeutsche Landesbank and copied to Deutsche Bundesbank, Bundesverband Deutscher Banken, Bundesverband der Deutschen Volksbanken und Raiffeisenbanken and Deutscher Sparkassen und Giroverband (file, pp. 2965 et seq.).

approach could only be implemented with difficulty as the independent Sparkassen and Genossenschaftsbanken could hardly accept charging their customers fixed rates plus commission while they themselves applied buying/selling rates with their central institutions.

For the above reasons, the signatories, as specialists in the currency exchange business, advocate maintaining selling and buying rates and sticking to tried-and-tested procedures to avoid any hitches in the run-up to the introduction of the euro'.

(56) During July and August 1997, the commercial banks replied to the abovementioned (recital 54) Bundesbank questionnaire ([25]).

(57) As a follow-up to the informal Ecofin Council meeting on 12 and 13 September 1997 in Luxembourg, a meeting took place on 15 September 1997 between commercial banks and the Bundesbank in Frankfurt. The meeting provided further clarification that charging via a spread (i.e. buying and selling rates) would not be possible after 1 January 1999. Any charges would have to be shown separately:

'The issue of fees, in particular exchange fees, was also addressed. On 1 September 1997, the Landeszentralbanks sent around a questionnaire by letter in order to determine whether the commercial banks would set a fee for the exchange of national euro-zone banknotes or whether they would practice a spread between two exchange rates. In this respect, the Bundesbank stated that charging for the exchange by way of a spread would no longer be possible. A solution would only be possible by way of a fee'.

3. **Facts**

(58) In April 1997 GWK Bank, with its 68 bureaux de change (including 33 at main railway stations and 25 along the border), became concerned at the pricing to be implemented in Germany for the buying and selling of in-currency banknotes following the disappearance of the spread on 1 January 1999.

(59) GWK Bank contacted a similar institution in Germany, Reisebank AG (with 59 bureaux de change at big railway stations and border crossings), initially to make them aware that the German Bundesbank might use its network of about 200 offices to provide a free service to the public for the buying of euro-zone banknotes during the transitional period (1 January 1999 to 31 December 2001) as a consequence of the implementation of Article 52 of the Statute of the European System of Central Banks (hereinafter called 'ESCB Statute'). This would pose a threat not only to Reisebank AG, but also to the main business of GWK Bank, which was the buying and selling of DEM.

(60) GWK Bank urged Reisebank AG to begin discussions with other German banks, in the first instance to try to ensure that the Bundesbank would not provide a free service to consumers via its network of 200 offices.

(61) These discussions and contacts led to a meeting at Deutsche Verkehrsbank AG (Frankfurt) on 15 October 1997 where price fixing between several German banks took place.

(62) The documentary evidence of the infringement is to be found in the reports of meetings and telephone conversations found during the inspection of 20 and 21 October 1999 at the premises of GWK Bank (Diemen) in the Netherlands.

3.1. *Meeting between GWK Bank and Reisebank AG on 29 April 1997*

(63) On 29 April 1997, a meeting took place in Frankfurt between GWK Bank and Reisebank AG. According to the minutes of this meeting ([26]), GWK Bank was surprised at Reisebank AG's lack of information on changes to be expected in the market for the exchange of euro-zone banknotes after 1 January 1999. Reisebank AG was under the impression that the exchange margins and fee structure for the exchange of euro-zone banknotes would be maintained until the introduction of euro cash in 2002:

'Minutes of 29 April 1997 of the meeting with Deutsche Reisebank ([27]) in Frankfurt concerning the euro problem (dated 2 May 1997).

…

([25]) Reply of Westdeutsche Landesbank to the SO, p. 17 (file, p. 3986).

([26]) 'Zusammenfassung der Gespräche vom 29 April 1997 mit der Deutschen Reisebank in Frankfurt über die Euro-Problematik'. Present: Mr […]* (Reisebank AG), Mr […]* (Reisebank AG), Mr […]* (GWK), Mr […]* (GWK); cc: […]* (GWK), […]* (GWK) and […]* (GWK); memo No AS/HB/Orig97/061 dated 2 May 1997 (file, pp. 2939 et seq.).

([27]) The documents found at GWK almost always refer to Reisebank AG as Deutsche Reisebank.

The predominant feeling at the discussions was astonishment on the part of GWK that Deutsche Reisebank lacked up-to-date information and astonishment on the part of Deutsche Reisebank at the position taken by the German Bundesbank and [because of] the other short-term euro problems.'

Assumptions by Reisebank

The gentlemen of Reisebank AG felt they were prepared for the euro. The development of the 'card-sales' product, the opening of bureaux de change on Germany's eastern border and the improvement of its market share in the exchange market would provide sufficient compensation for it to be able to face the future with confidence. In this scenario, however, Reisebank AG assumed that the euro problem would not arise until 2002. It expected there would be no changes to the cash exchange markets between 1 January 1999 and 1 July 2002 (or even as from May 1998), because:

1. the current margin structure would be maintained;

2. the current commission structure would be maintained;

3. the current network of exchange locations would remain unchanged.

(64) The information provided by GWK Bank to Reisebank AG at the meeting caused both surprise and concern. The main points raised were:

— exchange margins would disappear in 1999 and be replaced by a visible charge,

— the national central banks (NCBs), under the influence of the European Monetary Institute (EMI), were exerting pressure on the commercial banks to reduce bank charges after 1 January 1999,

— the Dutch National Bank had decided that the implementation of Article 52 vis-à-vis Dutch commercial banks would involve a free service for the repatriation of foreign euro-zone banknotes to their country of origin. Other NCBs were considering a free exchange service to the general public,

— there were rumours that German commercial banks were prepared to offer a free service for the exchange of euro-zone banknotes from 1 January 1999.

(65) On the above points, the meeting minutes state as follows:

'The information passed on by GWK

After we provided our information, there was a certain amount of disbelief and fear.

We provided the following information.

1. It is most probable that the margin structure will disappear in 1999, which will put pressure on the profit side; in the Netherlands, the banks consider that the margin will be nil and will have to be replaced by a (visible) commission. Public opinion could then turn against this higher commission.

2. The Dutch National Bank has tried (and according to Mr […]* is still trying) to induce the banks to require a substantially reduced remuneration for exchanging euro-zone cash and it is only because the banks insisted (according to the information provided by GWK) that a slight improvement in the DNB's position is to be observed. We conclude from this that other central banks (under the influence of the EMI) are exerting similar pressure on commercial banks.

3. This (political) pressure has been, together with Article 52, the occasion for an EMI-scale survey of the large commercial banks, in which GWK (because of its specialisation) has been included.

4. The DNB wishes to interpret Article 52 narrowly to mean that the European central banks are obliged to repatriate without charge only excess euro-zone currencies to the participating countries concerned and it does not wish to modify the existing infrastructure of the (retail) exchange business during the relevant period.

5. The DNB has taken this position after having been informed (mainly by GWK) of the problems that are to be expected.

6. GWK and the large banks are exploring the possibility of transforming the current margin- and commission-based remuneration structure into a purely commission-based remuneration as from the beginning of 1999 to avoid having to increase charges in parallel with the highly mediatised introduction of the euro.

7. More specifically, the German Bundesbank and the French and Italian central banks have insisted on a broad interpretation of Article 52 so that the public can enjoy a free service.

8. Rumours are circulating (according to Mr […]*) that German commercial banks are prepared to offer the public free cash-exchange transactions.

9. This would mean that the changes that are being planned by Deutsche Reisebank could most probably not be implemented.'

(66) According to the meeting minutes, Reisebank AG gave no credence to the GWK information. They decided to contact the Bundesbank and commercial banks in order to focus attention on the issues relating to the exchange of euro-zone banknotes after 1 January 1999:

'Deutsche Reisebank's reaction

The disbelief about the coming threat was palpable. Partly because of our presence and the conviction with which we expressed our views, this disbelief changed to consternation.

Deutsche Reisebank had no knowledge of the EMI survey. We have forwarded them a copy.

Action

Deutsche Reisebank will contact the Bundesbank and other banking institutions in order to draw attention in Germany also to the problems connected with the conversion of cash into euro. We have agreed to keep each other informed of developments.'

(67) The meeting minutes also note similarities in company structure between GWK Bank and Reisebank AG, as well as overlaps in product packages. Both banks made a charge for exchanging cash of around 3,5 % of the transaction value:

'Other information

Deutsche Reisebank has approximately 60 bureaux de change (e.g. in railway stations) and approximately 300 associates.

There is a clear overlap between product packages, e.g.:

Foreign exchange — Cash dispensers — Western Union – Card sales under development.

The head office employs about 50 people. Deutsche Reisebank's parent company has outsourced automation to a central cashier.

Of their current profits, approximately 80 % are exchange profits and total profits will, after the introduction of the euro, decrease by 40 % (it is not clear if these figures are based on the large or the small euro). The charge levied and the commission amount, as in the case of GWK, to around 3,5 %.'

(68) In its reply to the SO, Reisebank AG admits ([28]) that it was not aware of the major changes in forex business involving in-currencies during the transitional period, and in particular that the buying and selling rates for the exchange of euro-zone currencies had to be abandoned.

3.2. *Contact between GWK Bank and Reisebank AG on 5 May 1997*

(69) A week after the meeting of 29 April 1997, GWK Bank sent Reisebank AG two documents by fax dated 5 May 1997 ([29]).

(70) The first document was a copy of the completed 'Questionnaire to commercial banks and bureaux de change' which had been submitted to the central bank ([30]). This was an EMI questionnaire on the implementation of Article 52 of the ESCB Statute (exchange at par value of euro-zone banknotes between 1999 and 2002). The questionnaire had been sent by the EMI to the NCBs requesting information on the annual volume of banknote exchange business, means of banknote repatriation, buying and selling volumes of euro-zone currencies, seasonal variations, existing spreads and commissions, and breakdown of cost components. The NCBs, according to selection criteria chosen by each NCB, sent out the EMI questionnaire to a sample of national banks and bureaux de change.

(71) The questionnaire includes a section entitled 'You are invited to make comments and suggestions on the exchange of euro area banknotes on separate sheets of paper, if you so wish'. With the aim of maintaining total income after 1 January 1999, GWK Bank proposed a single handling fee of 3,8 % for the exchange of all euro-zone currencies:

'The total income from a normal euro area currency exchange transaction is about 3,8 %. To maintain the

([28]) Reply of Reisebank AG to the SO, pp. 21 et seq. (file, pp. 3715 et seq.).

([29]) Fax of 5 May 1997 from […]*, pp. […]* (GWK), to […]* (Reisebank AG), fax No 97.066 (file, pp. 2942 et seq.). Both of these documents were found during the inspection at GWK.

([30]) 'Questionnaire to commercial banks and bureaux de change', dated 13 January 1997, AS/NvdN/HB/Orig97/002 (file, pp. 2943 et seq.).

service to the public for the exchange of circulating euro zone currencies, it is necessary to have a compensating commission.

Income from a normal euro-zone currency exchange transaction

(NLG 350 × 3,8 %) = NLG 13,30

Total costs of a normal euro-zone currency exchange transaction = NLG 11,60.

There will be no decrease in costs for our institution after 1 January 1999 and from a euro point of view it is not feasible to maintain different commissions for each euro-zone currency. We therefore propose a handling fee of 3,8 % on a normal (without any discount) euro-zone currency exchange transaction. A figure of less than 3,8 % would be too low, particularly for euro-zone currencies with a relatively low turnover (euro-zone currencies other than DEM, BEF and FRF). Low turnovers result in additional interest losses and relatively higher back-offices expenses.

The Dutch National Bank has appended to the questionnaire additional comments on our constitution.

A copy of our comments is obtainable from the DNB.'

(72) The second document sent by GWK Bank to Reisebank AG contains the detailed supplementary comments of GWK Bank in the EMI questionnaire. This document explains that, to maintain a total exchange income of 2,4 % for all euro-zone currencies, and taking into account the loss of exchange margin income after 1 January 1999 as well as discounts for special groups and clients, an increased commission of 3,8 % would be required ([31]):

'Retail exchange transactions

….

The income as a percentage of turnover (2,5 %) is lower than the exchange rate margins in the list of exchange rates for banknotes and the commission rates would suggest.

Margin according to exchange rate list	2,88 % ([1])
Commission	1,00 %
Total income	3,88 %

([1]) Average margin weighted according to purchase and sales turnover.

….

Acceptable commission rate after 1 January 1999

From a social point of view, it is desirable that the service to the public for the exchange of circulating EU currencies be maintained at current levels during the period 1 January 1999 to 1 July 2002. As a result, an increased commission will have to be charged to compensate for the loss of the margin. For GWK, a 3,8 % commission charge on the equivalent of an ordinary exchange transaction will suffice. Discounts for special groups and clients conducting large transactions (including coupon cashing, see also p. 2) will ensure a total exchange income of 2,4 % (3,8 % — 1,38 %) from the entire EU currency turnover. The 3,8 % results in a charge to the consumer which is comparable to the charge for a current, average exchange transaction in EU currencies (exchange rate margin for banknotes plus commission), as further specified below (Annex 2 contains an extensive list of figures).

([31]) 'Supplementary comments on the questionnaire of 21 November 1996 regarding the euro, as drawn up by the European Monetary Institute (EMI)' dated 13 January 1997, NvdN//Orig97/007 (file, pp. 2954 et seq.).

	Margin [1] for banknotes as a percentage of exchange rate turnover	Current exchange rate for an NLG 350 transaction	Current commission for an NLG 350 transaction	Total customer charge for an NLG 350 transaction
EU currency of the euro zone	2,8 %	NLG 9,79	NLG 3,50	NLG 13,29
All currencies	2,88 %	NLG 10,08	NLG 3,50	NLG 13,58
EU currency exchange transaction with a 3,8 % commission				NLG 13,30

[1] The margin mentioned here is the average banknote margin for the respective currency group (see Annex 2), weighted by purchase and sales turnover.

A percentage less than 3,8 is too low, particularly for EU currencies with relatively low turnover (EU currencies other than DEM, BEF and FRF). Low turnovers result in greater loss of interest and relatively higher back-office expenses (counting, storage, transportation and transaction costs, etc.). From a "euro" point of view, it is not feasible to maintain different commissions for the individual EU currencies.'

(73) GWK Bank [32] and Reisebank AG confirmed that GWK Bank sent the above-mentioned documents. According to them, the proposal for a 3,8 % charge was merely a statement made in response to the EMI questionnaire. The EMI itself disseminated the results of the questionnaire.

(74) The Commission notes that neither the EMI questionnaire nor the EMI results of the questionnaire addressed bank charges for the exchange of euro-zone banknotes. The EMI drafted a questionnaire which included a request for information on the annual volume of banknote exchange business, means of banknote repatriation, buying and selling volumes of euro-zone currencies, seasonal variations, existing spreads and commissions, and a breakdown of cost components. The purpose was to gather information on the implementation by commercial banks of Article 52 of the ESCB Statute (i.e. the repatriation free of charge of banks' foreign euro-zone banknotes to their country of origin).

(75) The EMI prepared a report dated 23 April 1997 entitled 'Exchange at par value of euro area banknotes: Assessment of the results of the questionnaire to commercial banks'. The report was based on the answers to the questionnaire received by the NCBs from banks and bureaux de change and reflected the situation in 1996. The EMI questionnaire covered 14 Member States and responses were received from approximately 150 commercial banks and 40 bureaux de change. The EMI eight-page report contains aggregated data and does not discuss bank charges for the exchange of euro-zone currencies. The report was not published but the EMI Council agreed to release the assessment of the results to the European Banking Federation and the European Savings Banks Group [33].

3.3. *Meeting on 11 August 1997 between Reisebank AG, Deutsche Verkehrsbank AG, GWK Bank and Landeszentralbank Hessen*

(76) On 11 August 1997 a meeting took place in Frankfurt between Reisebank AG, Deutsche Verkehrsbank AG, Landeszentralbank Hessen and GWK Bank [34]. The purpose of the meeting was to clarify the situation regarding the exchange of euro-zone notes and coin during the transitional period:

'Report on talks between Reisebank, Landeszentralbank, Deutsche Verkehrsbank and GWK held on 11 August 1997 at the head office of Reisebank AG in Frankfurt, Germany

[32] Reply of the Fortis group to the SO, p. 13 (file, p. 4285).

[33] E-mail of 5 May 1999 from the European Central Bank to DG Competition in relation to a request for a copy of the report on 'Exchange at par value of euro area banknotes: Assessment of the results of the questionnaire to commercial banks'.

[34] 'Gesprächszusammenfassung Reisebank/Landeszentralbank/Deutsche Verkehrs-Bank/GWK vom 11 August 1997 am Hauptsitz der Reisebank AG in Frankfurt am Main'; Present: […]* (Reisebank AG), […]* (Reisebank AG), […]* (Reisebank AG), […]* (Deutsche Verkehrsbank AG), […]* (Landeszentralbank); cc: Members of the Board, […]*; […]*; memo No AS/HB/Orig97/130 (file, pp. 2967 et seq.).

Present:	Mr […]*	Reisebank AG
	Mr […]*	Reisebank AG
	Dr […]*	Reisebank AG (lawyer)
	Mr […]*	Deutsche Verkehrsbank AG
	Mr […]*	Landeszentralbank in Hessen
	Mr […]*	GWK
	Mr […]*	GWK
	Mr […]*	GWK

Opening remarks

Mr […]* welcomed everyone to the meeting. He pointed out that there were still many uncertainties with regard to the foreign exchange market for the period 1 January 1999 to 1 July 2002 and that one of the reasons for this meeting was to clarify the situation. After his brief introduction, he handed the floor to Mr […]*, who was present in his capacity as Reisebank AG's expert on the euro.'

(77) The legal representative of Reisebank AG made it clear that commercial banks would be allowed to charge for the exchange of euro-zone currencies during the transitional period but that the exchange margin (i.e. buying and selling rates) would cease to exist after 1 January 1999:

'Mr […]*

In Mr […]'s* opinion, most members of the EMI held the following two points of view:

1. Commercial banks would be allowed to charge clients for handling exchange operations in euro-zone currencies.

2. Changing circulating euro-zone currencies into euros would have to be free of charge to the customer for the first half of 2002.

Point 1

The commercial banks would be able to charge for handling exchange transactions. The form this payment would take would not be laid down by the EMI. It could take the form of a fixed commission, a percentage commission or even the current exchange margin, which could vary from currency to currency (combinations were also possible). Mr […]* pointed out to Mr […]* that after 1 January 1999 changing euro-zone currencies would in fact be like changing a single currency, but in different forms, and that consequently price differentiation between euro-zone currencies was not a straightforward matter. As Mr […]* saw it, price differentiation was only possible in the case of different cost prices. There were no demonstrable, significant differences in cost price between the different euro-zone currencies and it was therefore unlikely that the present exchange margin structure would be preserved.

….

Point 2

If euro-zone currencies must be converted into euros free of charge between 1 January 2002 to 1 July 2002, this would mean that as of 1 January 2002 GWK would no longer earn any profit from changing foreign euro-zone currencies. Hitherto we had assumed that only circulating guilders would be converted into euros free of charge.'

(78) At the meeting, the Landeszentralbank Hessen explained that, according to Article 52 of the ESCB Statute, the Bundesbank was obliged to purchase foreign euro-zone notes and coin from the banks and the public free of charge. The Bundesbank had carried out a survey of various banks to establish the number of transactions to be expected (recital 54):

'Landeszentralbank

The Bundesbank wished to interpret Article 52 as follows:

The central bank was under an obligation to buy foreign euro-zone currencies from banks and the public free of charge (at par was thus taken to mean free of charge, as it was by the Dutch central bank).

The bank would make alterations to (invest in) the present 180 (this number would fall) branches (Landeszentralbanks) so that it would actually be able to provide the service to the public. To establish how many transactions to expect, the Bundesbank had carried out a survey among various banks. Mr […]* stated that the Bundesbank was not happy with the obligation under Article 52.'

(79) This information that the Bundesbank and Landeszentralbanks might offer a free service to the public on a widespread basis caused alarm at GWK Bank. It urged Reisebank AG to reach a consensus with other German banks on the need to charge in order to avoid loss of profits from the exchange of euro-zone currencies during the transitional period:

'Follow-up action

After Mr […]* and Mr […]* had left, we reminded Deutsche Verkehrsbank and Reisebank of their duty to gather accurate information about the German exchange market as quickly as possible in order to

alert the Bundesbank, and other banks too, to the possible loss of profits which would result from providing exchange services free of charge. If, before the Bundesbank took its final decision, a consensus could be reached between the commercial banks on the need to charge for the service and if the Bundesbank could be convinced of the impossibility of the task before it, it might be possible to avert the threat to Reisebank. Mr […]* reacted to this by saying that this was a problem in Germany because there was no consensus at all between the banks nor could one be expected. It seemed that Mr […]* would not make any attempt to reach a consensus anyway.'

(80) GWK Bank was alarmed that, if the Bundesbank offered a free service on a widespread basis, then the German commercial banks might follow suit with low or no charges. There was a risk that the market for the exchange of euro-zone banknotes would shift from the Netherlands to Germany. There would be pressure on the Dutch banks to decrease charges accordingly:

'Conclusions

The developments in Germany were very alarming. The Bundesbank was going to intervene on the exchange market by providing services free of charge, which could easily have a knock-on effect on the level of charges levied by commercial banks, while the institution most closely concerned (Reisebank AG) could be expected to do little about it. The threat was also very considerable for the Dutch exchange market.

1. If the public was charged a reasonable amount in the Netherlands, there was a risk that the exchange market would shift from the Netherlands to Germany (or Austria etc.).

2. Low (or no) charges by commercial banks abroad would pave the way for a fall in charges in the Netherlands (with considerable help from the media).

3. The EMI could easily decide to opt for the Bundesbank's explanation, which would mean that the DNB would also be forced to introduce free exchange services and the consensus reached on the Dutch exchange market would again be up in the air.

The above development indicates that GWK must introduce as quickly as possible a high exchange rate commission in order to establish a new price balance on the Dutch market, before pressure from the EMI and DNB upsets the consensus reached.'

3.4. *Telephone conversation between GWK Bank and Deutsche Verkehrsbank AG on 29 September 1997*

(81) A telephone conversation took place between Mr […]* (GWK Bank) and Mr […]* (Deutsche Verkehrsbank AG) on 29 September 1997. Apparently, Mr […]* had not received the report of the meeting on 11 August 1997 and wanted to know about developments concerning Article 52 of the ESCB Statute ([35]). A record of the telephone conversation reads as follows:

'Record of (telephone) conversation with Deutsche Verkehrsbank AG, 29 September 1997

Mr […]*	Deutsche Verkehrsbank AG
Mr […]*	GWK

Reason

Mr […]* of Deutsche Verkehrsbank AG had somehow obtained the telephone number of Mr […]*.

Because he was on holiday, Mr […]* could not be present at the discussion of 11 August 1997 at Reisebank AG in Frankfurt, attended by:

Mr […]*	Landeszentralbank in Hessen
Mr […]*	Reisebank AG
Dr […]*	Reisebank AG (lawyer)
Mr […]*	Deutsche VerkehrsBank AG
Mr […]*	GWK
Mr […]*	GWK
Mr […]*	GWK

Mr […]* had evidently not received a report on this meeting.

He was looking for someone in the Netherlands who might know about developments regarding Article 52 and was looking for ways of doing something about this article in the international sphere.'

([35]) 'Zusammenfassung des Telefongesprächs mit der Deutschen Verkehrsbank AG vom 29 September 1997', between […]* (Deutsche VerkehrsBank AG) and […]* (GWK) cc: […]* (all GWK), memo No AS/HB/Orig97/149 of 29 September 1997 (file, pp. 2971 et seq.)

(82) The Commission notes that Deutsche Verkehrsbank AG at this point took the view that the exchange margins (i.e. buying and selling rates) should be replaced by a commission. This was contrary to the letter sent on 25 July 1997 by Commerzbank AG, Deutsche Verkehrsbank AG, Westdeutsche Landesbank and Reisebank AG to the Landeszentralbank Hessen arguing in favour of buying and selling rates being maintained after 1 January 1999 (recital 55). The record of the telephone conversation continues as follows:

'Assessment

Contrary to the letter Mr […]* had sent to Mr […]* (Landeszentralbank) about Article 52, Mr […]* now took the view that exchange margins should disappear in Germany and be replaced by a commission. His greatest concern was that no consultations had taken place on this development between the German banks and that only Commerzbank AG and Westdeutsche Landesbank were sharing their thoughts on this problem.

Four other German banks had pulled out. In Mr []'s* opinion, this had been imposed at Board level.'

(83) The record of the telephone conversation notes that Deutsche Verkehrsbank AG made the following invitation:

'Specific invitation

Mr […]* was attempting to get Commerzbank, Westdeutsche Landesbank, Verkehrsbank, Reisebank, and Landeszentralbank (Mr […]*) round the table during the week of 6 October 1997 to solve the problem. He specifically wanted GWK to be represented at the meeting. I assured him that I was in theory quite willing to attend this meeting with Mr […]*.'

3.5. *Meeting at Deutsche Verkehrsbank AG on 15 October 1997*

(84) By telefax dated 2 October 1997 entitled 'Consequences of EMU for the currency business', Mr […]* (Deutsche Verkehrsbank AG) invited representatives of SEB Bank AG (former BfG Bank AG), Commerzbank AG, Dresdner Bank AG, GWK Bank, Hamburgische Landesbank, Landesbank Hessen Thüringen, Landeszentralbank Hessen, Reisebank AG and Westdeutsche Landesbank to a meeting on 15 October ([36]). The purpose of the meeting was to discuss the state of play and possible measures.

(85) The meeting took place as planned on 15 October 1997 at Deutsche Verkehrsbank AG (Frankfurt) ([37]).

(86) The GWK Bank minutes of the meeting are entitled 'Pricing of euro currencies between 1 January 1999 and 1 July 2002'. Several topics were addressed including:

— whether banks could charge for the exchange of euro-zone banknotes during the transitional period,

— whether exchange margins (i.e. buying and selling rates) could be maintained after 1 January 1999,

— whether different commissions could be used for exchanging different euro-zone banknotes,

— the calculation method for conversion between different euro-zone currencies,

— buying and selling rates in the interbank (wholesale) banknote trade.

(87) The Commission notes that the meeting rapidly clarified that banks would be allowed to charge customers for the exchange of euro-zone banknotes and that charges must be shown in an explicit and transparent manner. The meeting minutes state as follows:

([36]) Fax entitled 'Auswirkungen der EWWU auf das Sortengeschäft' of 2 October 1997 from Mr […]* (Deutsche Verkehrsbank AG) to […]* (BfG Bank AG), […]* (Commerzbank AG), […]* (Dresdner Bank AG), […]* (GWK), […]* (Hamburgische Landesbank), […]* (Landesbank Hessen Thüringen), […]* (Landeszentralbank Hessen), […]* (Reisebank AG) and […]* (Westdeutsche Landesbank) (file, p. 2973). The then Bayerische Vereinsbank AG received a separate written invitation on 13 October 1997; see reply to the SO from Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 9 (file, p. 3896).

([37]) 'Zusammenfassung der Gespräche bei der Deutschen VerkehrsBank am 15 Oktober betreffend: Preisgestaltung bei Teilnehmerwährungen vom 1 Januar bis 1 Juli 2002', Present: […]* (Bayerische Landesbank), […]* (Vereins- und Westbank AG), […]* (DFG Bank AG, this being a typing error as it should read BfG Bank AG), […]* (Commerzbank AG), […]* (Deutsche VerkehrsBank AG), […]* (Deutsche VerkehrsBank AG), […]* (Dresdner Bank AG), […]* (Hamburgische Landesbank), […]* (Landesbank Hessen Thüringen), […]* (Westdeutsche Landesbank), […]* (GWK) and […]* (GWK); cc: […]* (all GWK), AS/NvdN/orig/160 (file, pp. 2974 et seq.).

'Record of talks with Deutsche Verkehrsbank, 15 October 1997

Re: Pricing of euro currencies between 1 January 1999 and 1 July 2002

Opening remarks

Mr […]* welcomed everyone to the meeting. The banks present at this meeting represented between 70 % and 80 % of the German retail exchange market. Mr […]* summarised the position of the Bundesbank and the EMI concerning the pricing of euro-zone currencies in the period from 1 January 1999 to (at the latest) 1 July 2002.

Full agreement had not been reached within the EMI on the question of the retail exchange of circulating euro-zone currencies. The following point was clear, however:

Banks would be allowed to pass on the costs they incurred in changing euro-zone currencies to the public. Passing on these charges must be done in a transparent manner.'

(88) The Commission notes that the meeting also quickly agreed that the exchange margins (i.e. buying and selling rates) would disappear after 1 January 1999. The participants decided to inform the Bundesbank that they would carry out the exchange of euro-zone banknotes at the fixed exchange rates and charge an explicit commission. The minutes record the following:

'Oral communications

Mr […]* read out correspondence between himself and the Bundesbank from which it was possible to infer that, in the interests of transparency, current exchange margins would have to be abolished. The oral explanation of this was very clear. Nowhere, however, was keeping the margin to offset costs explicitly rejected in writing. In the view of those present who had already looked into the matter more closely, the loss of the exchange rate margin could not be passed on to the retail trade.

Conviction

Following a remarkably short discussion, all of those present were convinced that the exchange rate margin on euro-zone currencies was going to disappear and that both the value of the money changed and the commission charged would have to be visible. This conclusion would be set out in a protocol to the Bundesbank. The following points would be made:

exchange transactions involving the euro-zone currencies will be carried out at fixed prices, to which a commission will be added.

Although Mr […]* shared the meeting's opinion, there was little more he could do. In the absence of written instructions from the Bundesbank, Mr […]* could not do anything in-house to adapt the computer systems to the new charging structure. Not everyone had this problem (e.g. the Bayerische Landesbank's preparations for replacing the margin with a commission charge were already well advanced) but there was general dissatisfaction with the lack of clarity in the Bundesbank's written statement.'

(89) The Commission notes that the meeting participants also discussed whether the existing system of different exchange margins per currency (i.e. different buying and selling rates per currency) should be transposed into a system whereby the existing exchange margins would be expressed as explicit percentage commissions. As complete consensus was not reached concerning the use of a single percentage commission charge for all currencies or different percentage commissions per currency, the participants decided to report to the Bundesbank that each bank would decide this for itself. However, the banks set themselves the common target of replacing the exchange margins by percentage commission(s) such as to recover 90 % of the exchange margin income. This would amount to an overall commission of about 3 %. The minutes mention the following:

'Differentiation in pricing between euro-zone currencies

The present pricing policy on the German exchange market was more or less the same for all banks. This meant, for example, that the Austrian schilling was bought and sold cheaply while the Italian lira was very expensive. Commerzbank's Mr […]* felt that this price difference between the various euro-zone currencies must be allowed to remain. He argued that, as current margins could be seen as a result of market mechanisms, this price fixing could be copied over into a differentiated charging structure. On this point Mr […]* (Bayerische Landesbank) said that the differentiation between currencies could only be justified because there were differing levels of exchange risk involved. This argument would no longer work after 1 January 1999 when all euro-zone currencies had to be seen as denominations of the

euro. Mr […]* added here that it was not so much that the market mechanism had influenced current margin policy, but rather that this policy was the result of a tacit agreement on exchange rates. The EMI survey quoted by Mr […]*, which stated that the German banking system's costs would fall by only 10 % with the introduction into circulation of the euro, showed that the price fixing on the exchange market was not caused by prices. This also indicated an oligopoly rather than a "polypoly".

Accordingly, the replacement of the current tacit differentiated-margin agreement by a tacit differentiated-commission agreement need not lead to major upheavals or loss of profits. Mr […]* was in full agreement with this.

In the absence of a complete consensus at the meeting on whether a single commission fee or a commission fee for each currency should be introduced, the following would be reported to the Bundesbank:

each of the banks present will decide for itself the form to be taken by its future charging structure.

The banks present at the meeting expressed the intention of replacing their present income from margins with income from commission fees up to a level of approximately 90 %. According to the banks, this would amount to a global commission of approximately 3 %'.

(90) The minutes note that the banks discussed the question of the quotation of the direct or indirect rate of exchange when converting between different euro-zone currencies ([38]), particularly within the context of modifying existing computer systems:

'Compulsory calculating rules

The EMI had stated that for establishing the value in German marks of an amount in guilders only one calculating method would produce the correct answer. This meant that the present calculating method used by computer systems would have to be completely reworked (the rate for the guilder against the German mark could no longer be worked out once the rules were applied). Several of those present were aware of these calculating rules, but had not considered the consequences for retail exchange operations. Mr […]* pointed out that it might be a good idea to do the same as the Belgian banks and inform the EMI that for the retail trade such a vast adaptation of computer systems for a period of only three years should be openly rejected, since the results of the various calculations for normal exchange transactions showed no difference.

Hasty note-taking on the part of those present seemed to imply that this problem too had been taken on board.'

(91) With regard to the wholesale interbank trade in banknotes, the minutes note that the participants agreed to maintain fixed buying and selling rates to avoid changes to computer systems. Professional traders were well aware of the charges being paid via the different buying and selling rates:

'Interbank trade

For interbank trade the exchange margins for currency in circulation should disappear. For trade in circulating currency, however, the banks at the meeting wanted to retain the current practice of using exchange margins. In this way the systems would not need to be adapted (for a three-year period) and there would be no problem if a bank outside the euro-zone needed circulating euro-zone currencies. Mr […]* (Landeszentralbank), who was following the meeting by phone, stated that according to his assessment it was unlikely that there would be binding legislation for interbank trade in circulating currencies. The following comment would be made to the Bundesbank:

For interbank trade in circulating currencies, euro-zone currencies should be bought and sold at fixed buying and selling prices. The difference between the buying and the selling price would be the commission.

Mr […]* observed that the wording was not really very well chosen since this argument had been rejected in the case of the retail trade and there was therefore no reason why it should be accepted in the case of the banks.

A better idea would therefore be to include a reference to the fact that transparency within professional trading did not need to be further

([38]) Article 4(4) of Regulation (EC) No 1103/97 states: 'Monetary amounts to be converted from one national currency unit into another shall first be converted into a monetary amount expressed in the euro unit, which amount may be rounded to not less than three decimals and shall then be converted into the other national currency unit. No alternative method of calculation may be used unless it produces the same results.'

increased, since the parties involved were well aware of the margins being paid. However, the chosen wording was kept.'

(92) The meeting minutes indicate that Deutsche Bank AG was considering a free service to customers for the exchange of euro-zone banknotes. This was seen as much more of threat to the agreed position of the participants for a commission fee of about 3 % (to achieve 90 % exchange margin income recovery) than any free service offered by the Landeszentralbanks:

'Deutsche Bank spoils the party

In the course of the meeting it was suggested that Deutsche Bank could spoil things by allowing exchange operations to go ahead free of charge. The commercial banks present at the meeting considered this to be a much more serious threat than the provision of services free of charge by the Landeszentralbanks (which were not equipped for it). This could undermine the position agreed at the meeting on a commission fee of approximately 3 % (90 % of present income). Mr […]* pointed out that this would in any case create a new situation, even though, in his view, it would be a long time before exchange activities would be carried out for nothing. Others took a firmer line and said that if, for political reasons, exchange operations were going to have to be carried out at zero tariff, they would withdraw exchange services for euro-zone currencies.'

(93) The meeting minutes record that the participants were not in favour of introducing the new charging system before 1 January 1999:

'Early introduction

The banks were not aiming for the introduction of the new charging structure before 1 January 1999:

1. as much profit as possible would have to be generated in 1998 (the idea of maintaining exchange margins until 1 January 1999, but charging a higher commission, was also felt to be inadvisable). After 1 January 1999 profits could fall sharply under outside pressure (Bundesbank, EMI, Deutsche Bank, the media), so the banks should grab what they could;

2. a possible reduction in turnover as a result of introducing the new charging structure in 1998 was therefore viewed as undesirable;

3. none of the banks was too obviously dependent on the exchange product, so developments after 1 January 1999 would not be life threatening;

4. the short time still remaining between then and 1 January 1999 was already felt to be tight for adapting all systems to the new charging structure.'

(94) Mr […]* (Commerzbank AG) wrote the official meeting minutes entitled 'Meeting of banknote dealers' ([39]). These minutes were faxed on 17 October 1997 by Deutsche Verkehrsbank AG to the meeting participants ([40]). The theme of the meeting is given as structure/price-setting for buying and selling banknotes during the transitional period. Both the private customer (retail) and interbank (wholesale) buying and selling of banknotes were discussed.

(95) With regard to the retail business, the minutes note that there was consensus on the use of fixed exchange rates for in-currencies (i.e. no buying and selling rates) with charges/fees to be calculated as a percentage commission. The calculation method for converting between in-currencies would be decided by each bank individually:

'Meeting of banknote dealers in Frankfurt on 15 October 1997

Held at Deutsche Verkehrsbank

Participants: see annex

Minutes

Concerning rating/pricing in forex business in phase 3a (1 January 1999 to 1 January 2002) of EMU, consensus was reached on the following points:

1. Private customer business

— For private customers there will be a fixed exchange rate for in-currencies and the charges/fees will be calculated separately.

([39]) 'Sortenhändlertreffen in Frankfurt, am 15. Oktober 1997 im Hause der Deutschen VerkehrsBank' of 15 October 1997 by […]* (Commerzbank AG) (file, p. 2985).

([40]) Fax 'Übersendung des Ergebnisprotokolls zum Sortenhändlertreffen am 15. Okt. 1997' from […]* (Deutsche VerkehrsBank AG) to Bayerische Landesbank, ([…]*), BfG Bank AG([…]*), Commerzbank AG ([…]*), Dresdner Bank AG ([…]*), GWK Bank ([…]*), Hamburgische Landesbank ([…]*), Landesbank Hessen Thüringen ([…]*), LZB Hessen ([…]*), ReiseBank AG ([…]*), Vereins- und Westbank AG ([…]*) and Westdeutsche Landesbank ([…]*) (file, pp. 2983 et seq.).

— Charges/fees will be calculated as a percentage amount of the exchange value.

— The decision whether the calculation will be done using the direct or indirect rate of exchange is to be taken individually by the banks'.

(96) The Commission notes that the official and GWK Bank minutes of the meeting correspond to the extent that the customer charges would be in a percentage form. The official minutes do not mention a charge of about 3 %. However, during the hearing on 1 and 2 February 2001, Bayerische Landesbank stated that its representative at the meeting of 15 October 1997 (Mr […]*) recalled that: 'some representatives of individual banks mentioned some figures, and these were somewhere between 2 % and 4 %'. However, Mr […]* 'could not recall the 3 %'.

(97) With regard to the wholesale (interbank) banknote business, the minutes note that the banks agreed to maintain buying and selling rates:

'2. Interbank trade

In interbank trade all in-currencies will be traded with buying and selling prices. These prices are the result of the conversion of the commission. The quotation of the indirect rate of exchange will become general usage as of 1.2.2002. Until that date both quotation methods are to be tolerated.

Reasons for the buying and selling quotation

In the interbank trade, where the usage has always been set by the participating banks, trading has always been done via buying and selling rates. This should not be changed as

— we do not want to make any distinction in the way of quotation between euro-zone currencies and so-called out-currencies,

— we do not want to distinguish between contracting parties inside and outside the euro zone,

and last but not least as

— a change in the present usage would only apply for a limited time period.

3. Next meeting, if needed, at Commerzbank, Frankfurt.

Frankfurt, 15 October 1997

[…]*

Annex'

F. LEGAL ASSESSMENT

1. Article 81(1) of the EC Treaty

(98) Article 81(1) of the EC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production, markets, technical development or investment, or share markets or sources of supply.

2. Agreements

(99) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.

(100) According to the established case-law of the Court of Justice of the European Communities and of the Court of First Instance, there can be said to be an agreement within the meaning of Article 81(1) of the EC Treaty when the parties have expressed their joint intention to conduct themselves on the market in a specific way ([41]).

(101) The concept of an agreement within the meaning of Article 81(1) of the EC Treaty, as interpreted by the case law, centres around the existence of concurrence of wills between at least two parties, the form in which it

([41]) Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86; Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256; Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, at paragraph 120.

is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention ([42]). An agreement for the purposes of Article 81(1) of the EC Treaty may also fall well short of the certainty required for the enforcement of a commercial contract. Its exact terms may never be expressed: the fact of agreement may have to be inferred from all the circumstances.

3. **The nature of the infringement**

3.1. *The agreement*

(102) The banks participating in the meeting of 15 October 1997 at Deutsche Verkehrsbank AG in Frankfurt agreed to implement a global commission of about 3 % for the buying and selling of euro-zone banknotes during the three-year transitional period beginning on 1 January 1999. The purpose was to recover about 90 % of the exchange margin income after the abolition of the spread on 1 January 1999 ([43]).

(103) At the meeting of 15 October 1997, the participants discussed whether the existing system of different exchange margins per currency (i.e. different buying and selling rates per currency) should be transposed into a system whereby the existing exchange margins would be expressed as explicit percentage commissions. As complete consensus was not reached concerning the use of a single percentage commission charge for all currencies or differentiated percentage commissions per currency, the participants decided to report to the Bundesbank that (recital 89):

> 'Each of the banks present will decide for itself the form to be taken by its future charging structure.'

(104) However, there was agreement that the percentage commission(s) would be set with the purpose of recovering about 90 % of the exchange margin income, meaning an overall or average commission of about 3 % for the buying and selling of different euro-zone banknotes (recital 89):

> 'The banks present at the meeting expressed the intention of replacing their present income from margins with income from commission fees up to a level of approximately 90 %. According to the banks, this would amount to a global commission of approximately 3 %.'

(105) The agreement was again referred to at the meeting of 15 October 1997. The banks were concerned that their agreement would be put in jeopardy if, as seemed likely, Deutsche Bank AG introduced a free service (recital 92):

> 'In the course of the meeting it was suggested that the Deutsche Bank could spoil things by allowing exchange operations to go ahead free of charge. The commercial banks present at the meeting considered this to be a much more serious threat than the provision of services free of charge by the Landeszentralbanks (which were not equipped for it). This could undermine the position agreed at the meeting on a commission fee of approximately 3 % (90 % of present income).'

(106) Mr […]* (Commerzbank AG) wrote the official meeting minutes entitled 'Meeting of banknote dealers'. The Commission notes that the official minutes and GWK Bank minutes of the meeting correspond to the extent that there was consensus on the use of fixed exchange rates for in-currencies (i.e. no buying and selling rates) after 1 January 1999, with charges/fees to be calculated as a percentage commission (recitals 94 and 95):

> '1. Private customer business
>
> — For private customers there will be a fixed exchange rate for in-currencies and the charges/fees will be calculated separately.
>
> — Charges/fees will be calculated as a percentage amount of the exchange value.'

(107) The official minutes are less descriptive than the GWK Bank minutes and do not mention specific figures. However Bayerische Landesbank and Commerzbank acknowledge that some bank representatives at the meeting expressed their ideas about possible future charges lying between 2 % and 4 % ([44]). At the hearing on 1 and 2 February 2001, Bayerische Landesbank stated that its representative at the meeting of 15 October 1997 (Mr […]*) recalled that 'some representatives of individual banks mentioned some figures, and these were somewhere between 2 and 4 %'. However, Mr […]* 'could not recall the 3 %.'

([42]) Case T-41/96 *Bayer AG* v *Commission* [1991] ECR II-3383, paragraphs 68-69.

([43]) Prior to the introduction of the euro, the banks had no explicit charges for the exchange of foreign banknotes. Instead, customers were paying hidden bank charges via the different buying and selling rates per foreign currency (spreads and/or exchange margins). The exchange margins ranged from about 1,5 % commission to 7 % depending on the currency being exchanged.

([44]) Replies to the SO: Bayerische Landesbank, p. 30 (file, p. 3454); Commerzbank AG, p. 35 (file, p. 3624); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 16 (file, p. 3903); Westdeutsche Landesbank, p. 47 (file, p. 4016); Hamburgische Landesbank mentions possible percentage charges ranging from 2 % to 6 %, p. 6 (file, p. 3768).

(108) The background to the agreement of 15 October 1997 is as follows. In early 1997, GWK Bank became concerned that the German Bundesbank might use its network of about 200 offices to provide a free service to the public for the buying and selling of banknotes during the transitional period (1 January 1999 to 31 December 2001). GWK Bank became concerned that if a free service were to be offered on a widespread basis by the Bundesbank and the Landeszentralbanks, then the German commercial banks might follow with low or no charges (recital 79).

(109) This prospect was alarming to GWK Bank since a large part of its turnover came from the exchange of in-currencies and the DEM in particular. There was a risk that the market for the exchange of euro-zone banknotes would shift from the Netherlands to Germany and/or there would be pressure on the Dutch banks to decrease charges accordingly (recital 80).

(110) In April 1997, GWK Bank contacted a similar institution in Germany, Reisebank AG, and urged them to begin discussions with other German banks, in the first instance to try to ensure that the German Bundesbank and the Landeszentralbanks would not provide a free service to consumers via their network of offices (recital 63 to 67).

(111) These discussions and contacts led to a meeting which took place at Deutsche Verkehrsbank AG (Frankfurt) on 15 October 1997 where several German banks agreed, *inter alia*, to implement a charge of about 3 % for the buying and selling of euro-zone banknotes during the three-year transitional period with the purpose of recovering about 90 % of the exchange margin income (recitals 85 to 93).

3.2. *The parties' arguments and the Commission's replies*

— Arguments of the parties in relation to the interpretation of the facts

(112) The parties challenge the Commission's interpretation of the facts and deny that the discussions between the banks concerning charging structures and amounts for the exchange of in-currencies during the transitional period amount to an 'agreement' falling within the scope of Article 81(1) of the EC Treaty.

(113) Several banks argue that, since the difference between the buying and selling rates can be calculated as a percentage charge, it was a logical step that participants in the meeting of 15 October 1997 agreed to express the exchange margin as a visible percentage commission after 1 January 1999. This was not a competition-restricting agreement but arose out of the legal necessity to display charges in an explicit and transparent manner with the disappearance of the spread ([45]) ([46]). Landesbank Hessen Thüringen admits having entered into an agreement on the charging structure for the transitional period at the meeting of 15 October 1997. As however there were hardly any alternatives to calculating the charge other than in a percentage form, this agreement on a common charging structure only marginally influenced the freedom of the banks to determine their own pricing policy ([47]).

— Commission's reply

(114) The transparent and explicit display of charges does not require any standardisation of prices, charging structures or other service concepts in the banking sector. Each bank must independently decide its commercial policy with regard to charging. If a customer bank charge is to be implemented at all, then the charging policy — including charging structure — must be determined independently by each bank.

(115) It was not a natural or logical step that each bank would individually have transposed the exchange margin into a percentage commission. Indeed, it seems that Deutsche Bank was initially considering a free service. In any case, the issue is not what may or may not be the most economically rational charging structure, but whether there was an agreement between banks on the charging structure.

(116) In the present case, there was an explicit agreement between banks on an overall commission of about 3 % with the aim of achieving about 90 % income recovery after the abolition of the spread on 1 January 1999.

([45]) Replies to the SO: BfG Bank AG, pp. 17 et seq. (file, pp. 3538 et seq.); Commerzbank AG, p. 31 (file, p. 3620); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 14 (file, p. 3901); Westdeutsche Landesbank, p. 48 (file, p. 4017).

([46]) Reply of Westdeutsche Landesbank to the SO, pp. 20 et seq. (file, pp. 3989 et seq.).

([47]) Reply of Landesbank Hessen Thüringen to the SO, p. 4 (file, p. 3817); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 14 (file, p. 3901) also claims that there was no other viable alternative to a percentage charge, as a fixed-fee changing of small amounts would have discriminated against the small consumer.

— Arguments of the parties to the effect that no agreement was reached

(117) Several banks argue that no agreement on a percentage charge of about 3 % was reached ([48]). Some banks also argue that there was no agreement to recover about 90 % of income nor was the figure of 90 % of the costs mentioned as the calculation basis for the new charges after the introduction of the euro ([49]).

— Commission's reply

(118) The question arises as to the credibility of the GWK Bank meeting minutes of 15 October 1997. The official minutes and GWK Bank minutes of the meeting correspond to the extent that there was consensus on the use of fixed exchange rates for in-currencies (i.e. no buying and selling rates) after 1 January 1999, with charges/fees to be calculated as a percentage commission. Westdeutsche Landesbank notes that only one point of the alleged infringement, the fixing of a charging structure, is included in the official minutes of the meeting produced by Mr […]* ([50]).

(119) Indeed, Bayerische Landesbank and Commerzbank AG acknowledge that some bank representatives at the meeting expressed opinions about possible future charges lying between 2 % and 4 % ([51]). Commerzbank AG states that some participants at the meeting mentioned that 90 % income recovery would lead to a charge of 2 % to 4 %, or an average commission of 3 %. At the hearing on 1 and 2 February 2001, Bayerische Landesbank stated that its representative at the meeting of 15 October 1997 (Mr […]*) recalled that 'some representatives of individual banks mentioned some figures, and these were somewhere between 2 and 4 %'. However, Mr […]* 'could not recall the 3 %'. This shows that the GWK Bank minutes, written within a day of the meeting, are a credible and complete record of the 15 October 1997 meeting.

(120) The Commission considers on the basis of the documentary evidence that the banks participating in the meeting of 15 October 1997 agreed to introduce an overall commission of about 3 % (to achieve 90 % income recovery) after 1 January 1999.

— Arguments of the parties against early introduction

(121) The banks also argue that fixing charges in 1997 would have made no sense because of the long period of 14 months before the introduction of the euro combined with all the economic uncertainties that could arise in such a time period ([52]). The banks argue that they fixed their charges independently in late 1998 ([53]).

— Commission's reply

(122) The argument that it would have been premature for the banks to agree on charging structures and charges in October 1997 is contradicted by the banks themselves. The letter sent by four commercial banks (Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG and Westdeutsche Landesbank) to the Bundesbank on 25 July 1997 states their view that the exchange margin (i.e. buying and selling rates for in-currencies) should be maintained because, amongst other reasons, the necessary information technology (IT) changes could not be made in time for 1 January 1999 (recital 55):

> 'The question of charging instead of the current spread (selling/buying rates) was seen as highly problematic.
>
> As a result of the discussion, all participants have in principle rejected a change as the resulting costs for IT adaptation would make the exchange of banknotes more expensive, and the public would not appreciate higher charges. Consumers would not understand the

([48]) Replies to the SO: BfG Bank AG, pp. 19 et seq. (file, pp. 3540 et seq.); Commerzbank AG, p. 35 (file, p. 3624); Reisebank AG, p. 27 (file, p. 3721); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 16 (file, p. 3903); Westdeutsche Landesbank, p. 47 (file, p. 4016).

([49]) Replies to the SO: Bayerische Landesbank, p. 30 (file, p. 3454); BfG Bank AG, pp. 18 et seq. (file, p. 3539); Commerzbank AG, pp. 33 et seq. (file, pp. 3622 et seq.); Reisebank AG, pp. 26 et seq. (file, pp. 3720 et seq.); Landesbank Hessen Thüringen, pp. 16 et seq. (file, pp. 3830 et seq.); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 15 (file, p. 3902); Westdeutsche Landesbank, pp. 47 et seq. (file, p. 4016); Fortis group, p. 23 (file, p. 4295).

([50]) Westdeutsche Landesbank reply to the SO, p. 43 (file, p. 4012).

([51]) Replies to the SO: Bayerische Landesbank, p. 30 (file, p. 3454); Commerzbank AG, p. 35 (file, p. 3624); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 16 (file, p. 3903); Westdeutsche Landesbank, p. 47 (file, p. 4016); Hamburgische Landesbank mentions possible percentage charges ranging from 2 % to 6 %, p. 6 (file, p. 3768).

([52]) Reply to the SO: Dresdner Bank AG, p. 10 (file, p. 3750); Westdeutsche Landesbank, p. 42 (file, p. 4011).

([53]) Replies to the SO: Bayerische Landesbank, pp. 34 et seq. (file, pp. 3458 et seq.); BfG Bank AG, p. 20 (file, p. 3541); Commerzbank AG, pp. 36 et seq. (file, pp. 3625 et seq.); Dresdner Bank AG, p. 10 (file, p. 3750); Hamburgische Landesbank, pp. 9 et seq. (file, pp. 3771 et seq.); Landesbank Hessen Thüringen, pp. 12 et seq. (file, pp. 3826 et seq.); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, pp. 22 et seq. (file, pp. 3909 et seq.); Westdeutsche Landesbank, pp. 33 et seq. (file, pp. 4002 et seq.).

introduction of a charge when exchange rates were fixed and central banks purchased in-currencies free of charge.

It is also important to note that IT changes cannot be made at such short notice.'

(123) The GWK Bank meeting minutes of 15 October 1997 also mention that the time remaining for adapting information technology systems to the new charging structure was short (recital 93):

'4. The short time still remaining between then and 1 January 1999 was already felt to be tight for adapting all systems to the new charging structure.'

(124) The conclusion to be drawn from the above is that the price-fixing agreement of 15 October 1997 was most opportune and timely for the banks.

— Arguments of the parties concerning the different charges

(125) The banks claim that the banks present at the meeting of 15 October 1997 apply different charges ranging from 3 % to 4 %. Only 2 banks actually apply a 3 % charge ([54]).

— Commission's reply

(126) Firstly, it should be noted that the finding of the existence, content and object of an agreement infringing Article 81(1) of the EC Treaty and described in the SO was based on specific documentary evidence and not on parallel pricing behaviour in the market.

(127) Secondly, since the agreement was to introduce an overall commission of about 3 % aimed at achieving about 90 % income recovery, it is not to be expected that all banks would have identical percentage commissions. The agreement eliminated or, at the very least, substantially reduced uncertainty as to the eventual conduct to be expected of each other on the market with regard to bank charges for the buying and selling of in-currency banknotes. The banks themselves admit that charges of 2 % to 4 % were discussed. However, following the introduction of the euro, none of the parties introduced a commission of less than 3 % (recitals 147 and 148).

([54]) Replies to the SO: Bayerische Landesbank, p. 43 (file, p. 3467)); BfG Bank AG, p. 20 (file, p. 3541); Commerzbank AG, p. 41 (file, p. 3630); Deutsche Verkehrsbank AG / Reisebank AG, p. 28 (file, p. 3722); Dresdner Bank AG, p. 10 (file, p. 3750); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, pp. 25 et seq. (file, pp. 3912 et seq.); Westdeutsche Landesbank, pp. 43, 53 (file, pp. 4012, 4022).

4. **Restriction of competition**

(128) The banks participating in the meeting of 15 October 1997 agreed to an overall commission of about 3 % with the aim of achieving about 90 % income recovery after the abolition of the spread on 1 January 1999. This agreement had both the object and effect of restricting competition in the Community.

4.1. *Object of the agreement*

(129) Article 81(1) of the EC Treaty expressly mentions as restrictive of competition agreements between undertakings and decisions by associations of undertakings which directly or indirectly fix purchase or selling prices or any other trading conditions. In the present case, the direct fixing of prices is the object of the agreement.

(130) Faced with the disappearance of the exchange margin (i.e. buying and selling rates) income after 1 January 1999, the object of the agreement concluded by the banks present at the meeting of 15 October 1997 was to fix the participating banks' commissions for the buying and selling of in-currency banknotes at about 3 % with the aim of achieving about 90 % income recovery after the abolition of the spread on 1 January 1999.

(131) Therefore, it must be concluded that the agreement had as its object a harmonisation of banks' future pricing policies and the alignment of prices in the buying and selling of in-currency banknotes.

(132) It follows from the above that the agreement concluded between the banks present at the meeting of 15 October 1997 is caught by Article 81(1) of the EC Treaty in that it directly fixes the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and the level of charges in the form of a target price.

4.2. *The parties' arguments and the Commission's replies*

— Arguments of the parties concerning the interpretation of Article 52 of the ESCB Statute

(133) The parties argue that their discussions were held to address considerable regulatory uncertainty concerning the implementation of Article 52 of the ESCB Statute, particularly as regards whether or not the German Bundesbank would offer a free forex service to the public.

— The Commission's reply

(134) In 1997, the German Bundesbank had discussions with German commercial banks principally concerning implementation of Article 52 of the ESCB Statute. A meeting took place on 8 July 1997 between the commercial banks and the Bundesbank at which the consequences of the introduction of the euro for the exchange of banknotes was discussed. Following this meeting, the Bundesbank on 22 July 1997 sent a questionnaire to commercial banks concerning the buying and selling of banknotes in the retail and wholesale markets. The questionnaire asked for data on volumes of banknotes exchanged, the transparency of charges during the transitional phase, the consequences on the retail business if the Bundesbank were to offer a free service to the public, and the consequences for the wholesale business if the Bundesbank were to offer a free banknote repatriation service to the commercial banks. The response of each bank was to be treated confidentially by the Bundesbank. Also as a consequence of the 8 July 1997 meeting, on 25 July 1997 four commercial banks (Commerzbank AG, Deutsche Verkehrsbank AG, Reisebank AG and Westdeutsche Landesbank) sent a letter to the Bundesbank expressing their view that the exchange margin (i.e. buying and selling rates for in-currencies) should be maintained, in part, because the necessary IT changes could not be made in time and because any adaptation would give rise to additional costs giving rise to higher charges. A meeting took place on 15 September 1997 between commercial banks and the Bundesbank, which clarified that charging via the exchange margin (i.e. buying and selling rates) would not be possible after 1 January 1999. Any charges would have to be shown separately (recitals 53 to 57).

(135) As is clear from the above, the discussions between the Bundesbank and commercial banks concerned the application of Article 52 as well as the abolition of the buying and selling rates on 1 January 1999. The meetings did not encompass collective discussions on bank charges for the exchange of euro-zone banknotes after 1 January 1999.

— Arguments of the parties to the effect that the Commission was the initiator of the discussions

(136) According to the parties the Commission was the initiator of the discussions and contacts between the banks. The starting point was the Round Table on 15 May 1997 organised by the Commission and dealing with practical aspects of the transition to the euro ([55]). The banks argue that the reason for the meeting of 15 October 1997 is to be found in the regulatory uncertainties and as a consequence of the initiatives of the European Commission and discussions with the German Bundesbank.

— The Commission's reply

(137) The Commission organised the Round Table of 15 May 1997 on practical aspects of the changeover to the euro to address concerns expressed by various associations and to advance technical preparations. The Round Table provided a forum for dialogue among all interested parties, both public and private, and addressed two main sets of issues: the practical arrangements for a smooth changeover to the euro and ways of helping currency users adjust to the euro. The Expert Group report of 20 November 1997 expressly states that it did not deal with charges for bank services ([56]) (recitals 40 to 43).

— Arguments of the parties on the question of the admissibility of charges

(138) According to the parties, their discussions were also held to address the question as to whether or not it would be permissible for the commercial banks to charge for the exchange of banknotes by way of spreads.

— The Commission's reply

(139) As early as 1995 it was known that the exchange rates would be irrevocably fixed and that only those fixed rates should be used. This is clearly and explicitly stated

([55]) Reply of Westdeutsche Landesbank to the SO, pp. 32 et seq. (file, pp. 4001 et seq.).

([56]) See paragraph 4 'What is conversion' of the Report of the Expert Group on Banking Charges for Conversion to the Euro to the European Commission, Brussels, 20.11.1997.

in the Presidency conclusions of the Madrid European Council of 15 and 16 December 1995 on the scenario for the changeover to the single currency. Article 4(3) of Council Regulation (EC) No 1103/97, which has been directly applicable law in all Member States since 20 June 1997, states that 'The conversion rates shall be used for conversions either way between the euro unit and the national currency units' (recitals 34 to 37). The direct consequence of this is that the use of spreads would not be permissible, and that any charges should be explicitly and transparently shown. All this is also clearly stated in the document setting the terms of reference of the Expert Group on Banking Charges for Conversion to the euro and in the final report of this Expert Group (recital 45).

(140) In any case, prior to the meeting of 15 October 1997, a meeting took place (on 15 September 1997) between commercial banks and the Bundesbank which clarified that charging via the exchange margin (i.e. buying and selling rates) would not be possible after 1 January 1999 (recital 57).

— Arguments of the parties concerning the invitation fax

(141) Several banks claim that, as can be seen from the agenda attached to the invitation fax, the meeting of 15 October 1997 was focused on questions of interbank trade — where pricing was mentioned — as well as on IT issues ([57]). It is for this reason that the representatives present at the meeting were either from the department dealing with the buying and selling of notes in interbank trade or from the IT department. The private customer department, being the only one with decision-making power concerning the setting of forex charges for private customers, was not represented ([58]).

— The Commission's reply

(142) Even the official minutes of the meeting produced by Mr […]* record that discussions took place on pricing for both the private customer business and interbank trade (recitals 94 to 97). It seems therefore that the banks' representatives were competent to discuss pricing for both retail and wholesale aspects of the banknote exchange business. The Commission considers on the basis of the documentary evidence that the banks participating in the meeting of 15 October 1997 agreed to introduce a global commission for private customers of about 3 % (to achieve 90 % income recovery) after 1 January 1999.

(143) With regard to computer (IT) systems, the Commerzbank AG representative explained during the hearing that the retail and wholesale information technology systems are interlinked (if not the same computer program). This means that the pricing/charging systems for both the retail and wholesale business would need to be known prior to any adaptation of the IT systems. Indeed, for private customers, the official minutes indicate that during the three-year transitional period beginning on 1 January 1999 the parties agreed that 'Charges/fees will be calculated as a percentage amount of the exchange value' (recital 95). With regard to the interbank trade, the parties opted to keep buying and selling rates.

4.3. *Implementation of the agreement*

(144) In order to conclude that Article 81(1) of the EC Treaty applies, there is no need to consider the actual effects upon competition of an agreement once it is established that the agreement had the object of restricting competition.

(145) In the present case, there was an agreement between banks on a global commission of about 3 % with the aim of achieving about 90 % income recovery after the abolition of the spread on 1 January 1999.

(146) The Commission considers that, having concluded that the agreement was to directly fix the level of charges, there is no need to demonstrate any effect.

(147) In any case, the agreement did have an effect on charges that were implemented on the market:

Dresdner Bank AG	3 %
Commerzbank AG	3,75 %
Bayerische Hypo- und Vereinsbank AG	3,0 % (minimum DEM 10) ([59])
Vereins- und Westbank AG	3,0 % (minimum DEM 10) ([60]).

([57]) Replies to the SO: Commerzbank AG, p. 29 (file, p. 3618) and Annex 16 (file, p. 3671); BfG Bank AG, p. 15 (file, p. 3536); Hamburgische Landesbank, p. 4 (file, p. 3766).

([58]) Replies to the SO: Bayerische Landesbank, p. 29 (file, p. 3543); BfG Bank AG, p. 16 (file, p. 3537); Dresdner Bank AG, p. 5 (file, p. 3745); Landesbank Hessen Thüringen, p. 10 (file, p. 3824); Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 10 (file, p. 3897).

([59]) Minimum reduced from DEM 10 to DEM 6 on 11 March 1999.

([60]) Minimum abolished on 2 August 1999.

(148) According to Reisebank AG, the charges with the introduction of the euro were ([61]):

Selling: 3,5 % plus a service fee of DEM 5 ([62])

Buying: 4,5 % plus a service fee of DEM 5

These are the same selling and buying percentage commissions as introduced by GWK on 16 June 1998:

Selling: 3,5 % (for transactions up to NLG 5 000), minimum NLG 5

Buying: 4,5 % (for transactions up to NLG 5 000), minimum NLG 5 ([63])

5. **Effect on trade between Member States**

5.1. *Currency exchange*

(149) The infringement at issue concerns a service which is cross border in nature and, for that reason alone, likely to affect trade between Member States. As shown above, there is a large volume of euro-zone currencies exchanged in each Member State (recitals 7 to 9).

(150) Selling and buying of foreign currencies within the euro zone are operations concerning essentially consumers, and in particular tourists (both Community and non-Community) who wish to make payments within the euro zone. Payments made by consumers with currencies other than those of their country of origin constitute transactions which affect intra-Community trade.

(151) It should be noted that, if consumers buy foreign currencies in their home countries, the bank selling the currencies must first have imported the bank notes. If, on the other hand, consumers buy currencies in the countries of destination with foreign cash, the selling bank must export (or repatriate) the foreign cash to the country of origin. For each bank within the euro zone, there is never a perfect balance at a given time between the volumes of foreign currencies bought from, and sold to, the public.

([61]) Reply of Reisebank AG to the SO, pp. 18 et seq. (file, pp. 3712 et seq.).

([62]) Three weeks later, Reisebank AG changed its percentage commissions for selling to:

DEM 0,01 — DEM 500	3,5 %,
DEM 500,01 — DEM 1 000	3,25 %,
DEM 1 000,01 — DEM 2 000	3,0 %,
DEM 2 000,01 — DEM 5 000	2,75 %,
from DEM 5 000,01	2,5 %.

([63]) 1,5 % for selling transactions above NLG 5 000.
2,5 % for buying transactions above NLG 5 000.

(152) The import and export of euro-zone currencies by the banks are commercial operations that directly affect intra-Community trade.

5.2. *The parties' arguments and the Commission's replies*

— Arguments of the parties concerning the effect on trade between Member States

(153) At the hearing ([64]) the banks argued that the German case was a purely national case thus not having any effect on trade between Member States. The exchange of foreign currencies was a local service, provided on different national markets. Despite being present at the meeting of 15 October 1997, GWK Bank was not active on the German market just as the German banks were not active on the Dutch market.

— The Commission's reply

(154) The Court of Justice has consistently held that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between Member States ([65]). Accordingly, the Court has held that the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive ([66]). It is also settled case law that it is enough to establish that an agreement is capable of having an effect on trade between Member States ([67]).

(155) The Commission has described in the statement of objections and the present Decision (see recitals 149 to 152) several factors which have been taken into account when concluding that the agreement has an effect on trade between Member States. Following the case-law of the Court of Justice, the Commission holds that in this case the effect on trade is a combination of several factors, which taken as a whole, show that there is an effect on trade.

([64]) Presentation given by Dr Satzky on behalf of all the banks at the hearing on 1.2.2001.

([65]) Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7 and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22.

([66]) Case C-250/92 *Gottrup-Klim* [1994] ECR I-5641, paragraph 54.

([67]) Case C-219/95 *P Ferriere Nord SpA* v *Commission* [1997] ECR I-4411, paragraph 19.

(156) In the present case, however, particular attention should be paid to the special nature of the service and the product concerned. As noted above, the service is already cross-border in nature. This stems from the fact that the products concerned are the currencies of other Community Member States, which are exchanged in large volumes in each Member State.

— Arguments of the parties concerning the lack of a market definition

(157) The banks claim that the Commission has failed to define the geographic market and has therefore made an incorrect assessment of the effect on trade.

— The Commission's reply

(158) The Commission contends that a definition of the geographic market is not decisive in this case. This is due to the fact that the documentary evidence proves that the parties committed an infringement whose object and effect was to restrict competition. The infringement was also by its nature liable to affect trade between Member States. This conclusion is in line with the Court of First Instance rulings in *European Night Services* and *Volkswagen AG* ([68]), in which the Court held that there is an obligation on the Commission to define the market in a decision applying Article 85 (now Article 81) of the EC Treaty where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

(159) The fact that the agreement on charges for the exchange of in-currencies concerns mainly Germany and the Dutch regions bordering on Germany does not preclude an effect on trade between Member States. The Court of Justice has ruled in a number of cases that behaviour restricting competition and extending over the whole territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about ([69]).

(160) In particular, the relevant product has been defined as the service of exchanging in-currencies where at least one part of the transaction concerns notes. The banks have to buy and sell banknotes on the international wholesale markets as a direct consequence of national demand for foreign currency. The Court of Justice has held in *Stichting Sigarettenindustrie* ([70]) that an agreement concluded between undertakings established in one Member State and covering only the market of that state affects trade between Member States if it concerns, even partly, a product imported from another Member State.

G. ADDRESSEES OF THE DECISION

(161) It is clearly established by the facts that Commerzbank AG and Dresdner Bank AG have directly participated in the infringement.

(162) The question of appropriate addressees arises only in relation to:

— Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG,

— Deutsche Genossenschaftsbank / Deutsche Verkehrsbank AG / Reisebank AG.

(163) At the time of the meeting of 15 October 1997 the majority shareholder in Vereins- und Westbank AG was the then Bayerische Vereinsbank AG. Bayerische Vereinsbank AG and Bayerische Hypotheken- und Wechselbank AG merged on 1 September 1998 to form Bayerische Hypo- und Vereinsbank AG. This merger made Bayerische Hypo- und Vereinsbank AG the major shareholder in Vereins- und Westbank AG.

(164) Bayerische Hypo- und Vereinsbank AG is the second biggest banking group in Germany and considers itself to be a 'bank of the regions' in which Vereins- und Westbank AG has an individual identity as 'bank of the region of Northern Germany'.

(165) Although the invitation fax for the incriminating meeting of 15 October 1997 was sent only to the then Bayerische Vereinsbank AG, no employee of the then Bayerische Vereinsbank AG participated in the meeting.

(166) The recipient of the invitation fax for the meeting of 15 October 1997 in the then Bayerische Vereinsbank AG showed it to his superior, who decided that

([68]) Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 105 and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraphs 230 and 231.

([69]) See *inter alia* Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29 and Case T-29/92 *SPO* v *Commission* [1995] ECR II-289, paragraph 229.

([70]) Joined Cases 240-242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 49.

participation was not necessary. The fax recipient however passed the invitation on to a colleague at Vereins- und Westbank AG as he was of the opinion, in contrast to his superior, that it might be possible to obtain some useful information at the meeting.

(167) Vereins- und Westbank AG was not invited to the meeting, but nonetheless one of its employees participated and also represented ([71]) the then Bayerische Vereinsbank AG ([72]).

(168) As a result both Vereins- und Westbank AG and Bayerische Vereinsbank AG were represented at the meeting of 15 October 1997 through the employee of Vereins- und Westbank AG.

(169) The reply to the SO of Bayerische Hypo- und Vereinsbank AG/Vereins- und Westbank AG states that Vereins- und Westbank AG was not bound by the policy of Bayerische Hypo- und Vereinsbank AG concerning the fixing of charges for the exchange of euro-zone bank notes ([73]). This shows that both banks operated independently on the market and that Bayerische Hypo- und Vereinsbank AG did not influence Vereins- und Westbank AG's decision on charges.

(170) In the light of the above the Decision is therefore addressed to Vereins- und Westbank AG in its own right and to Bayerische Hypo- und Vereinsbank AG as the legal successor to the former Bayerische Vereinsbank AG.

(171) Deutsche Genossenschaftsbank AG has a 67 % shareholding in Deutsche Verkehrsbank AG. Deutsche Verkehrsbank AG owns all the shares in Reisebank AG with three members of the managing board of Deutsche Verkehrsbank AG as the sole members of the supervisory board of Reisebank AG. Reisebank AG is the only company within the Deutsche Genossenschaftsbank AG group that is active exclusively in the retail forex business ([74]). Deutsche Verkehrsbank AG at all times exercised decisive influence over its subsidiary by participating in meetings and in discussions with other banks (see recitals 58 to 97). Deutsche Verkehrsbank AG was at all times fully informed and aware of all the discussions between banks concerning charges for the exchange of euro-zone banknotes. According to the case law of the Court of Justice, the decisive criterion in deciding if Article 81(1) of the EC Treaty can be applied between a parent company and a subsidiary is whether or not the subsidiary was able to determine its market behaviour independently of the parent company ([75]). In the present case, Reisebank AG enjoyed no real autonomy in determining its own course of action vis-à-vis Deutsche Verkehrsbank AG. Reisebank was therefore not capable of infringing Article 81(1) of the EC Treaty independently of Deutsche Verkehrsbank.

(172) In the light of the above, this Decision is therefore addressed to Deutsche VerkehrsBank AG as the parent company of Reisebank AG ([76]).

H. **DURATION OF THE INFRINGEMENT**

(173) Commerzbank AG, Dresdner Bank AG, Deutsche VerkehrsBank AG, Bayerische Hypo- und Vereinsbank AG and Vereins- und Westbank AG concluded the agreement infringing Article 81(1) of the EC Treaty in October 1997. The agreement was concluded for the duration of the 'transitional' period 1 January 1999 to 31 December 2001.

([71]) In the reply of Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG to the SO, p. 4 (file, p. 3891) the banks claim that Vereins- und Westbank AG, although not invited to the meeting of 15 October 1997, sent an employee as representative of the then Bayerische Vereinsbank AG.

([72]) In the reply of Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG to the SO, pp. 9 et seq. (file, pp. 3896 et seq.) it is stated that the recipient of the invitation fax for the meeting of 15 October 1997 in the then Bayerische Vereinsbank AG showed it to his superior, who decided that participation was not necessary. The fax recipient however passed the invitation on to a colleague of his at Vereins- and Westbank AG as he was of the opinion, in contrast to his superior, that it might be possible to obtain some useful information at the meeting.

([73]) Reply of Bayerische Hypo- und Vereinsbank AG / Vereins- und Westbank AG, p. 24 (file, p. 3911).

([74]) Reisebank AG reply to the SO, pp. 2 et seq. (file, pp. 3696 et seq.). In its reply to the SO, DG Bank stated that it is not active in the forex business (file, p. 3689).

([75]) The leading case for determining whether Article 81(1) can be applied between parent and subsidiary company and whether they can thus be independent members of a cartel is Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraphs 47 to 55 (as confirmed by the Court of Justice in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457), in which it is stated that: Article 85(1) (now Article 81(1)) does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit if the subsidiary, although having a separate legal personality, does not freely determine its conduct on the market but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled. Paragraph 16 of the judgment in Case C-73/95 P reads as follows: Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them.

([76]) The judgment in Case C-286/98P *Stora* v *Commission* [2000] ECR I — 9925 reads, at paragraph 26, as follows: It should be remembered that, as the Court of Justice has held on several occasions, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, *inter alia*, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 and 133; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44; and Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15).

(174) In the light of the above, the duration of infringement established for all addressees of this Decision is from 15 October 1997 to the present time.

I. REMEDIES

1. Article 3 of Regulation No 17

(175) Where the Commission finds that there is an infringement of Article 81(1) of the EC Treaty, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Council Regulation No 17 ([77]).

(176) In the present case, the agreement, whose object was to fix (a) the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and (b) a target price level of about 3 % (to achieve 90 % exchange margin income recovery), was concluded for a future three-year period beginning on 1 January 1999 and ending on 31 December 2001.

(177) Therefore, the Commission requires the undertakings to which the present Decision is addressed to henceforth refrain from any agreement, concerted practice or decisions of associations which may have the same or similar object or effect as the agreement which is the subject of this Decision.

2. Article 15(2) of Regulation No 17

2.1. *General considerations*

(178) Under Article 15(2) of Council Regulation No 17, the Commission may by decision impose upon undertakings or associations of undertakings fines from one thousand to one million euro, or a sum in excess thereof not exceeding 10 % of the turnover in the preceding business year of each of the undertakings and associations of undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the EC Treaty.

(179) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No 17.

(180) The Commission follows the methodology explained in its guidelines of 14 January 1998 on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 (hereinafter called 'guidelines on fines') ([78]).

(181) The role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fine imposed any aggravating or attenuating circumstances and will apply, where appropriate, the notice on the non-imposition or reduction of fines in cartel cases (hereinafter called 'leniency notice') ([79]).

2.2. *Basic amount of the fines*

(182) In order to determine the amount of the fines, the Commission calculates a basic amount that will be increased to take account of aggravating circumstances, or reduced to take account of attenuating circumstances. The basic amount is determined according to the gravity and duration of the infringement.

2.2.1. Gravity

(183) In its assessment of the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

(184) In this case the agreement had the object of fixing (a) the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and (b) the level of charges in the form of a target price (to achieve 90 % exchange margin income recovery) for the exchange of in-currency banknotes. Article 81(1) of the EC Treaty expressly prohibits both direct and indirect fixing of prices or other trading conditions. By its nature, the infringement is a very serious violation of Article 81(1) of the EC Treaty.

(185) The agreement was implemented by Commerzbank AG, Dresdner Bank AG, Bayerische Hypo- und Vereinsbank AG, Vereins- und Westbank AG and Deutsche Verkehrsbank AG (recitals 147 and 148).

(186) However, the infringement produced its effects within a limited part of the common market, namely in Germany, where the agreement covered the whole country, and in the Dutch regions bordering on Germany.

([77]) OJ 13, 21.2.1962, p. 204/62.

([78]) OJ C 9, 14.1.1998, p. 3.

([79]) OJ C 207, 18.7.1996, p. 4.

(187) Given that the infringement by its nature is a very serious violation of Article 81(1) of the EC Treaty but limited in its effect to Germany and the Dutch regions bordering on Germany, the Commission on balance concludes that the agreement concerned falls within the category of a serious infringement of the Community competition rules.

(188) Within the category of serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition and to set the fine at a level which ensures that it has sufficient deterrent effect. This exercise seems particularly necessary where, as in the present case, there is considerable disparity in the size of the undertakings participating in the infringement.

(189) For this purpose the undertakings concerned can in principle be divided into two categories according to their size and their relative importance in the relevant market. The comparison is made on the basis of the income information for the last business year for which audited results are available.

(190) Into the first category fall Commerzbank AG, Dresdner Bank AG, Bayerische Hypo- und Vereinsbank AG and Deutsche Verkehrsbank AG. Vereins- und Westbank AG falls into the second category.

(191) On the basis of the foregoing, the appropriate starting point for a fine resulting from the criterion of relative importance in the relevant market is for each category as follows:

Commerzbank AG	EUR 10 million,
Dresdner Bank AG	EUR 10 million,
Bayerische Hypo- und Vereinsbank AG	EUR 10 million,
Deutsche VerkehrsBank AG	EUR 10 million,
Vereins- und Westbank AG	EUR 2 million.

(192) In order to ensure that the fine has a sufficient deterrent effect, the Commission will determine whether any further adjustment of the starting point is needed for any undertaking.

(193) In the case of Commerzbank AG, Dresdner Bank AG and Bayerische Hypo- und Vereinsbank AG, the Commission considers that the appropriate starting point for a fine resulting from the criterion of the relative importance in the relevant market requires further upward adjustment to take account of their size and their overall resources.

(194) On the basis of the foregoing, the Commission considers that, in the case of Commerzbank AG, Dresdner Bank AG and Bayerische Hypo- und Vereinsbank AG, the need for deterrence requires that the starting point of its fine determined under recital 191 should be increased by EUR 10 million to EUR 20 million.

2.2.2. Duration

(195) As mentioned earlier, the Commission considers the duration of the infringement of Article 81(1) of the EC Treaty for all addressees of this Decision to be from 15 October 1997 until the present time (recitals 173 and 174). The starting amounts of the fines determined for gravity (recital 191) are therefore increased by 40 % for each of the undertakings.

(196) The Commission accordingly sets the basic amount of the fines as follows:

Commerzbank AG	EUR 28 million,
Dresdner Bank AG	EUR 28 million,
Bayerische Hypo- und Vereinsbank AG	EUR 28 million,
Deutsche VerkehrsBank AG	EUR 14 million,
Vereins- und Westbank AG	EUR 2,8 million.

2.3. *Individual fines*

(197) In setting the fine for each company, the Commission is obliged to assess any aggravating or attenuating circumstances on an individual basis and to apply, as appropriate, the leniency notice.

(198) In the present case there are no aggravating or attenuating circumstances.

2.4. *Amount of the fines imposed in the present proceedings*

(199) In conclusion, the Commission fixes the fines to be imposed pursuant to Article 15(2) of Regulation No 17 as follows:

Commerzbank AG	EUR 28 million,
Dresdner Bank AG	EUR 28 million,
Bayerische Hypo- und Vereinsbank AG	EUR 28 million,
Deutsche VerkehrsBank AG	EUR 14 million,
Vereins- und Westbank AG	EUR 2,8 million.

HAS ADOPTED THIS DECISION:

Article 1

Commerzbank AG, Dresdner Bank AG, Bayerische Hypo- und Vereinsbank AG, Deutsche Verkehrsbank AG and Vereins- und Westbank AG have infringed Article 81(1) of the EC Treaty by participating in an agreement whose object was to fix (a) the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and (b) a target price level of about 3 % (to achieve 90 % exchange margin income recovery) during the transitional period beginning on 1 January 1999.

Article 2

The undertakings named in Article 1 shall put an end to the infringement.

They shall henceforward refrain in relation to their activities from any agreements or concerted practices which may have the same or a similar object or effect as the infringement.

Article 3

The following fines are hereby imposed on the undertakings named in Article 1 in respect of the infringement found herein:

Commerzbank AG	EUR 28 million,
Dresdner Bank AG	EUR 28 million,
Bayerische Hypo- und Vereinsbank AG	EUR 28 million,
Deutsche VerkehrsBank AG	EUR 14 million,
Vereins- und Westbank AG	EUR 2,8 million.

Article 4

The fines imposed by Article 3 shall be paid within three months of the date of notification of this Decision to the following account:

Account No: 642-0029000-95

Code IBAN: BE76 6420 0290 0095

Code SWIFT: BBVABEBB

of the European Commission with:

Banco Bilbao Vizcaya Argentaria (BBVA) SA
Avenue des Arts/Kunstlaan, 43
B-1040 Brussels.

After expiry of that period, interest shall be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this decision is adopted, plus 3,5 percentage points.

Article 5

This decision is addressed to:

1. Commerzbank AG
   Kaiserplatz
   D-60261 Frankfurt am Main;

2. Dresdner Bank AG
   Jürgen-Ponto-Platz 1
   D-60329 Frankfurt am Main;

3. Bayerische Hypo- und Vereinsbank AG
   Am Tucherpark 16
   D-80538 München;

4. Deutsche VerkehrsBank AG
   Friedrich-Ebert-Anlage 2-14
   D-60325 Frankfurt am Main;

5. Vereins- und Westbank AG
   Alter Wall 22
   D-20454 Hamburg.

This decision shall be enforceable pursuant to Article 256 of the EC Treaty.

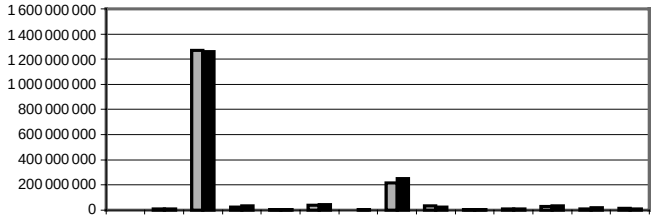
Done at Brussels, 11 December 2001.

For the Commission
Mario MONTI
Member of the Commission

ANNEX

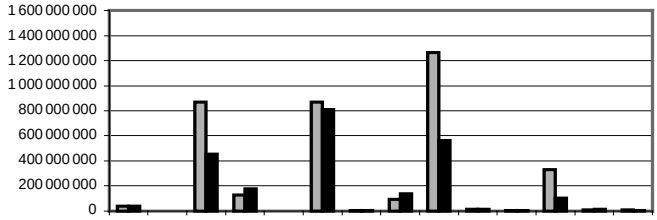
AUSTRIA

(in EUR)



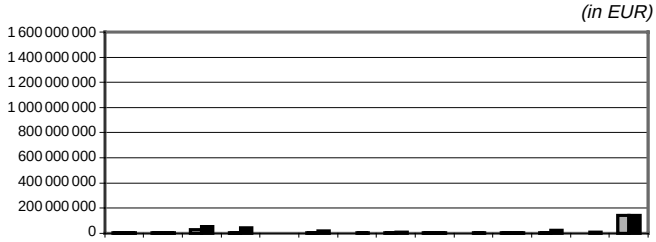
BELGIUM

(in EUR)



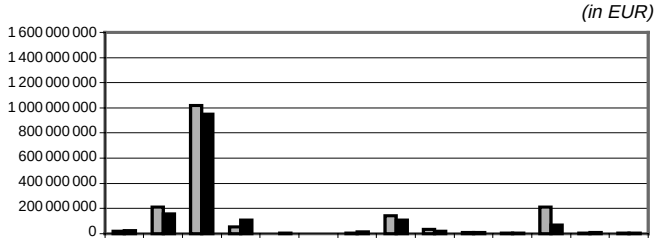
FINLAND

(in EUR)



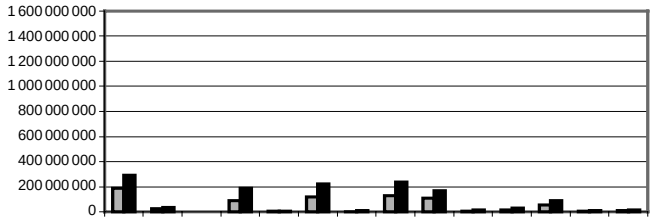
FRANCE

(in EUR)



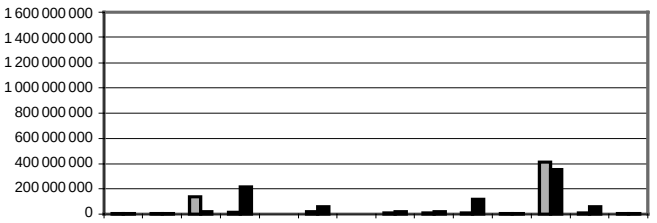
GERMANY

(in EUR)



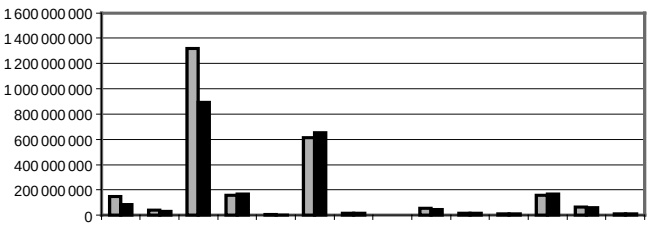
IRELAND

(in EUR)



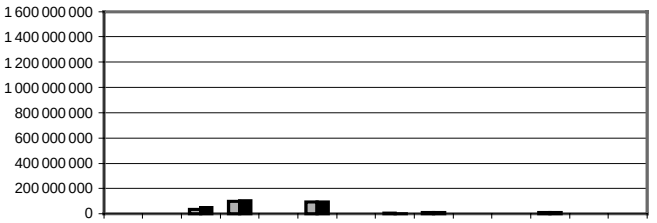
ITALY

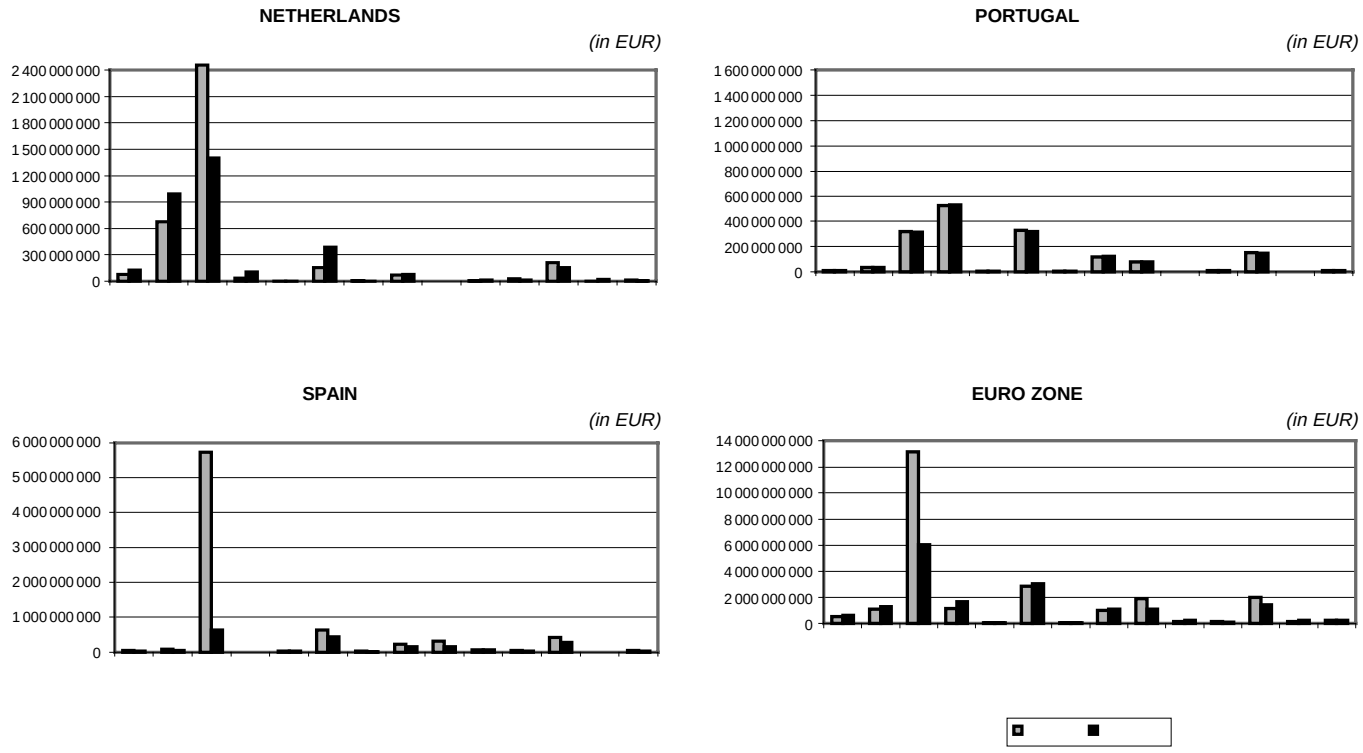
(in EUR)



LUXEMBOURG

(in EUR)





Buying and *selling* volumes per euro-zone country for EU currencies (in EUR, 1998)

(Note: Different scales for the Netherlands, Spain and the euro zone).